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Report of the International Law Commission on the work of its sixtieth session (2008)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-third session, prepared by the Secretariat

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Introduction

1. At its sixty-third session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, on 19 September 2008, to include in its agenda the item entitled "Report of the International Law Commission on the work of its sixtieth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 16th to 26th meetings, from 27 to 31 October and from 3 to 5 and on 14 November 2008. The Committee considered the report in three parts. Accordingly, the Chairman of the Commission at its sixtieth session introduced the report as follows: chapters I to V and XII (Part I) at the 16th meeting, on 27 October; chapters VI to VIII (Part II) at the 18th meeting, on 29 October; and chapters IX to XI (Part III) at the 22nd meeting on 31 October. At the 26th meeting, on 14 November, the Sixth Committee adopted draft resolution A/C.6/63/L.20, entitled "Report of the International Law Commission on the work of its sixtieth session", as orally revised, and draft resolution A/C.6/63/L.21 on the law of transboundary aquifers. The draft resolutions were adopted by the General Assembly at its 67th plenary meeting, on 11 December 2008, as resolutions 63/123 and 63/124 respectively.

3. By paragraph 26 of its resolution 63/123, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the sixty-third session of the Assembly. In compliance with that request, the Secretariat has prepared the present topical summary. It consists of nine sections: A. Shared natural resources; B. Effects of armed conflicts on treaties;[1] C. Reservations to treaties; D. Responsibility of international organizations; E. Expulsion of aliens; F. Protection of persons in the event of disasters; G. Immunity of State officials from foreign criminal jurisdiction; H. The obligation to extradite or prosecute (*aut dedere aut judicare*); and I. Other decisions and conclusions of the Commission.

Topical summary

A. Shared natural resources

1. General comments

4. The present section addresses only comments and observations made by delegations in relation to the oil and gas aspects of the topic.[2] There was general support for the Commission's approach of treating aquifers separately from oil and gas. In the main, it was observed that the challenges of managing transboundary oil and gas reserves were quite different from those relating to transboundary aquifers, invoking different social, economic and commercial implications. For instance, the commercial issues involved provided an incentive for States to cooperate and find practical solutions, through bilateral relationships, to benefit all parties concerned. While the huge economic stake associated with oil and gas resources was

[1] See A/CN.4/606/Add.1.

[2] The majority of comments and observations of delegations on this topic concerned the draft articles on the law of transboundary aquifers, adopted on second reading by the Commission at its sixtieth session (see A/C.6/63/SR.16-19, 21, 22 and 24).

acknowledged, the point was nevertheless made that water had given rise to so-called water wars, that the private sector had long been involved in the management of drinking water, and, accordingly, that there was still a need for collaboration, and legal specialists should not maintain total separation between the two types of resources.

2. Consideration of oil and gas

5. As to whether or not the Commission should proceed to oil and gas in its consideration of the topic, different views were expressed by delegations. First, considering the clear similarity to groundwater and the relevance of oil and gas in international relations, some delegations observed that it would be useful to States for the Commission to examine the subject in greater detail. Such consideration would also assist in identifying common elements from State practice. In the light of an emerging obligation under international law to enter into unitization agreements for the development of such resources, it would be helpful to identify the elements that such agreements should have in order to foster the efficient and equitable use of the resources.

6. Second, there were delegations that were reluctant to see the Commission address the topic further. Given that economic and political stakes,[3] as well as fundamental bilateral interests, were associated with such resources, it was argued that any proposal by the Commission to regulate oil and gas resources would probably be controversial. Bilateral mechanisms represented the best way for States to manage such reserves, and, judging from experience, this was an area in which bilateral discussions with other States were guided by pragmatic considerations and based on technical information. It was also suggested that there was no urgent humanitarian need to protect oil and gas resources, as there was in the case of transboundary aquifers. Furthermore, the view was expressed that there was already legal certainty in that area. While acknowledging the existence of considerable State practice, particularly in the field of cooperation on offshore transboundary petroleum resources on the basis of maritime delimitation agreements and subsequent unitization agreements, some delegations pointed out that full consideration of bilateral arrangements would involve a lot of complexity and interface with other disciplines and arrangements. In this connection, it was suggested that it might be more productive for the Commission to note the existence of such practice rather than to make an attempt at codification. Indeed, some delegations doubted the need for any universal rules on shared oil and gas resources or for draft articles on the subject. In view of the unique challenges posed, it was considered imperative that States have the flexibility to create cooperative frameworks on a case-by-case basis. Furthermore, in many cases, oil and gas considerations were linked to questions of maritime delimitation. Accordingly, those delegations doubted that the subject matter was appropriate for the Commission to consider, with some noting that such an exercise would not be productive.

7. Third, the point was nevertheless made that in the event the Commission found it necessary to address the subject matter, it should refrain from considering matters relating to offshore boundary delimitation. The United Nations Convention on the Law of the Sea of 1982 left no doubt that maritime delimitation was a matter for the States concerned and that the question of whether oil and gas reserves were shared

[3] See also A/C.6/62/SR.22, para. 89.

was inextricably linked to the resolution of maritime delimitation claims. Once delimitation agreements were in place, they often contained a unitization clause providing for the joint exploitation of oil and gas deposits straddling the agreed boundary. It was suggested that it could be useful to outline common principles and features, best practices and lessons learned through a review of State practice, which could guide States in negotiating agreements on the partition of oil and gas deposits.

8. Fourth, in the light of the request of the Commission in 2007 for Governments to provide information on State practice, the view was expressed that, while the Commission might continue to conduct preliminary studies, it would be premature to embark upon the codification of the law on that subject before it had received replies from a sufficient number of Governments.

B. Effects of armed conflicts on treaties

9. For comments on draft articles adopted on first reading, see A/CN.4/606/Add.1.

C. Reservations to treaties

1. General comments

10. Delegations welcomed the Commission's effort to address the issue of interpretative declarations, which had been neglected in the Vienna Convention on the Law of Treaties. It was appropriate to deal, even with great care, with interpretative declarations in conjunction with reservations to treaties since there were links between them as, for example, when interpretative declarations might be disguised reservations. The view was expressed that the interpretative declaration could serve as an aid to interpretation for its author or for a State or an international organization that had approved it. The point was also made that the interpretation put forward in a unilateral declaration by one State party could have effect only with respect to the declaring State unless another State party explicitly aligned itself with that interpretation. It was observed that the use of interpretative declarations was widespread, and in all too many cases they caused difficulty because of their similarity to reservations. The view was expressed that the absence of literature and the scarcity of practice concerning interpretative declarations could have led to seeking solutions inspired by the legal regime of reservations. It was also noted that the Guide to Practice should establish the connection between interpretative declarations and articles 31 and 32 of the Vienna Convention. Interpretative declarations could be considered basic means of achieving agreement on the interpretation of a given provision.

11. The point was made that interpretative declarations and reactions to them formed part of a broader context than the single treaty to which they related and touched on the way in which States interpreted their rights and obligations in international law. Therefore, the Special Rapporteur's caution about undertaking a study of the general theory of acquiescence, for the purposes of the topic, was justified. Similarly, an in-depth consideration of the analogy between approval of an interpretative declaration and agreement between the parties regarding the interpretation of the treaty would go far beyond the scope of the topic.

2. Interpretative declarations

12. It was pointed out that it was valid to distinguish between different types of reactions (approval, disapproval, silence and reclassification), although the effect of each raised different problems. It would not be helpful to try to create a separate regime in which acquiescence could play a specific role in regard to interpretative declarations.

13. The approval of an interpretative declaration constituted subsequent agreement on the interpretation in accordance with article 31, paragraph 3 (a), of the Vienna Convention. It was suggested that the Commission draw up specific approval criteria consisting of three features displayed simultaneously: silence, conduct and the lapse of a reasonable length of time. States were under no obligation to react to interpretative declarations, nor could such declarations limit the rights of other parties.

14. The option open to contracting States to clarify or specify the meaning of a treaty or certain provisions thereof should not be ignored. It was suggested that, with regard to the consequences of an interpretative declaration for a State that expressly approved or opposed it, a general reference to customary rules on the interpretation of treaties should be sufficient. Opposition to an interpretative declaration might either restrict or exclude the intended legal consequences of the declaration. Except in cases where contracting States reclassified an interpretative declaration as a reservation, there was an inherent flexibility in the system of interpretive declarations and the reactions that they produced in accordance with the essential role played by the intention of the parties and their interpretation of the treaty.

15. The view was also expressed that the term "reclassification" created grounds for misinterpretation and risked giving the impression that the reservation in disguise could have been an interpretative declaration until it was "reclassified". The real intent should be to "interpret" the interpretative declaration and decide whether or not it constituted a reservation. The use of unconventional terms might give the impression that the Commission wanted to rewrite the Vienna Convention regime. It was pointed out that the practice of severing invalid reservations from the treaty relations between the States concerned was in accordance with article 19 of the Vienna Convention; it also opened the possibility of dialogue within the treaty regime.

16. It was suggested that conditional interpretative declarations could be considered as interpretative declarations if the interpretations contained therein were acceptable. Doubts were expressed about the category of conditional interpretative declarations that in fact constituted reservations and as such the reservations regime should apply to them. According to another point of view, it was premature to rule on whether that type of declaration constituted an interpretative declaration or a reservation. Further analysis should be carried out in order to establish clearly the legal nature of conditional interpretative declarations and to identify the legal effects and procedures associated with them. According to another point of view, the distinction between simple and conditional interpretative declarations was contrived and entailed methodological consequences.

17. It was observed that States, when acceding to or ratifying a treaty, often issued declarations that contained elements of a political nature; such declarations might constitute a third category of interpretative declarations.

18. The view was expressed that the question of the consequences of interpretative declarations should be considered in the light of the principle of estoppel. A State that had made an interpretative declaration should not be able to subsequently renounce or change its declaration without the agreement of other States or international organizations that had approved the proposed interpretation. It was also suggested that since interpretative declarations had no legal effect, it made no sense to treat the consequences of an objection to a declaration as being similar to the consequences of an objection to a reservation. Unjustified objections, which could be dictated by purely political considerations, should not be seen as acts giving rise to legal consequences.

19. The point was also made that the legal effect of objections was an important aspect of the topic. Since objecting States seemed to disregard the reservation on that objection, an emerging custom might seem to modify the rules set out in the Vienna Convention.

20. The view was expressed that the time frame for objecting to a reclassified interpretative declaration should not be the same as that for objecting to a reservation. It was a mistake to use the analogy of reservations and objections when dealing with interpretative declarations. The onus of clarifying the intention behind a unilateral statement was on the author of the statement; other States parties had a legitimate expectation that the author State would label its statement appropriately.

21. It was observed that a unilateral declaration could result in an agreement between the parties or a practice whereby they agreed on the meaning of the treaty.

22. According to another point of view, the subject of reactions to interpretative declarations was not ripe for codification and went beyond the original mandate of the topic. There was insufficient State practice, and the general regime put forth was not advanced enough to address what little practice existed. Moreover, the terms "approval" and "opposition" implied that a State's reaction had legal consequences for the interpretative declaration, which would rarely, if ever, be the case. The proposed guidelines went beyond the progressive development of international law to promote a new legal regime where one did not exist. States often used interpretative declarations simply to avoid the formal limitations involved when using reservations; consequently, such limitations should not extend to interpretative declarations. The introduction of detailed guidelines on interpretative declarations might not only affect the role of those declarations but might make the guidelines themselves hard to apply.

3. Silence as a reaction to interpretative declarations

23. The view was expressed that the legal consequences of silence in response to an interpretative declaration should be assessed in the light of article 31, paragraph 3 (a), of the Vienna Convention.

24. It was observed that there were circumstances in which silence in response to an interpretative declaration could be construed as acquiescence. It was observed that the issue of acquiescence should be ascertained by reference to international law or further elaborated. Since there was no time limit on reacting to interpretative

declarations, it would be hard to determine when the silence of other contracting States could be deemed acquiescence. Silence could not constitute acquiescence when there was no duty to react.

25. It was pointed out that circumstances could not be envisaged in which silence in response to an interpretative declaration could be taken definitively to constitute acquiescence. However, the acceptance of an interpretative declaration could not be presumed and could not be inferred from the lack of silence. Several delegations agreed that consent to an interpretative declaration should not be inferred from silence.

26. There were circumstances in which silence or the conduct of a State would be inevitably taken into account for the purposes of interpretation of the treaty in the event of a dispute between two contracting States.

27. On the other hand, while silence against a reservation constituted acceptance with the sole exception of reservations incompatible with the object and purpose of the treaty, silence against interpretative declaration could never give rise to any legal effects.

28 Silence did, however, have a legal effect in cases where, according to general State practice, a protest against the interpretation given would be expected from the State or international organization concerned.[4]

29. It was suggested that silence was prima facie evidence of agreement, particularly in the case of treaties the subject matter of which would require a prompt reaction from States parties.

30. The view was expressed that silence in response to an interpretative declaration denoted indifference rather than approval or opposition. More careful study was needed in order to determine under which specific circumstances silence might be construed as acquiescence.

31. Under certain circumstances, the combination of the interpretative declaration, silence and the resulting mutual expectation of the declaring State and the silent State — as well as of third States — could result in the attribution of an effect to the silence that would be difficult to assess, falling between acceptance of the interpretative declaration and a waiver of the position that the silent State might have held up until that time. Such circumstances should be decided case by case on the basis of the content of the interpretative declaration, the specific situation in which the silence occurred and the previous position of both States on the issue.

4. Comments on specific draft guidelines

Guideline 2.1.9: Statement of reasons

32. It was observed that the recommendation in draft guideline 2.1.9 that a reservation include the reasons it was being made, although useful and reflecting some usage, did not correspond to general practice. However, the importance of formulating reservations in a clear and well-defined manner that allowed their precise scope to be determined should not be diminished. It was also pointed out that this recommendation might result in limiting the freedom of States to formulate reservations, and the Vienna Convention did not require such reasons. On the other hand, support

[4] North Atlantic Coast Fisheries case (Great Britain v. United States of America).

was expressed for any effort to encourage greater clarity in the formulation of reservations. The number of objections to reservations might be reduced if the parties to the treaty had greater insight into the reasons for a State's reservation. It was also observed that reasons were often highly political and that the authors of reservations and objections tended to avoid explaining them.

Guideline 2.6.5: Author

33. It was noted that this guideline provided for an objection by States or international organizations entitled to become parties to the treaty whereas article 20 of the Vienna Convention of 1969 referred simply to "another contracting State".

34. Doubts were expressed concerning the right of States or international organizations entitled to become parties to the treaty to formulate objections before becoming contracting parties. Declarations made by this category of States and international organizations did not produce any legal effect and their mention had no place in the Guide to Practice. Support was also expressed for this guideline, although it was mentioned that an approach based on the legal consequences of an objection rather than its subjective character might be preferable. Moreover, the guidelines did not cover cases in which a treaty was being applied provisionally when reservations and objections could also have legal effects. It was suggested that a requirement be added to confirm the objection at the time of signature.

Guideline 2.6.10: Statement of reasons

35. It was pointed out that the recommendation on this guideline encouraging the statement of reasons for an objection was necessary. Objections were made both to admissible reservations and to reservations considered inadmissible. Since the legal consequences differed, the reasons for the objection should be indicated.

Guidelines 2.6.13/2.6.15: Time period for formulating an objection and late objections

36. It was suggested that the 12-month deadline for an objection was too rigid and implied presumption of the acceptance of a reservation when no objection had been made within 12 months. Objections had often been made after the expiry of the 12-month period, and the guidelines should reflect this practice.

Guidelines 2.6.14/2.6.15: Conditional objections and late objections

37. It was pointed out that conditional objections and late objections should be treated in the same way. As for late "objections", they could not alter the legal consequences of the reservation even if the author of the "objection" tried to persuade the author of the reservation to accept it. The guideline should rather be entitled: "late notification of an objection".

Guideline 2.9.1: Approval of an interpretative declaration

38. It was suggested that the term "consent" would be more appropriate in relation to interpretative declarations and should replace the word "approval".

Guideline 2.9.3: Reclassification of an interpretative declaration

39. Doubts were expressed concerning the reclassification of an interpretative declaration. The formulation in draft guideline 2.9.3 gave the impression that an individual State could determine on its own whether the declaration was interpretative or a reservation.

40. It was pointed out that this guideline should be taken into account in the examination of interpretative declarations formulated with regard to treaties that did not expressly allow or prohibit the formulation of reservations; furthermore, account should simultaneously be taken of guidelines 1.3 and 1.3.3.

41. It was also pointed out that there was no need for further categorization, particularly since the determination of whether an interpretative declaration constituted a reservation was based on an objective definition of the term "reservation".

42. It was pointed out that States and international organizations should not have the right to reclassify an interpretative declaration made by another State or international organization.

43. The view was expressed that the capacity of other States parties to reclassify what the author State had classified as a mere interpretative declaration would be limited by the fact of such declaration being subject to the time frame applicable to objections to reservations. Practitioners and depositaries needed guidance on the form and legal effects of reactions to disguised reservations. An extension of the 12-month time limit could be adapted to cases of "disguised reservations", thus allowing 24 months for the formulation of objections and averting the risk that a disguised objection, by passing unnoticed as an interpretative declaration, would benefit from the same time limit as a reservation formulated as such.

Guideline 2.9.4: Freedom to formulate an approval, protest or reclassification

44. It was observed that there should be a time limit (12-month deadline) for the formulation of a reclassification.

45. It was suggested that a State or an international organization should not be able to formulate an interpretative declaration in respect of a treaty or certain of its provisions in the context of a dispute-settlement process involving the interpretation of the treaty or the provisions in question. A reference to the principle of good faith would be useful.

Guideline 2.9.9: Silence in response to an interpretative declaration

46. It was observed that the relationship of this guideline to guideline 2.9.8, Non-presumption of approval or opposition, required further clarification and more precise definition of the phrase "certain specific circumstances", since it gave rise to presumptions about an interpretative declaration, while guideline 2.9.8 provided for the non-presumption of approval of or opposition to an interpretative declaration.

D. Responsibility of international organizations

1. General comments

47. Delegations commended the Commission and the Special Rapporteur for the results achieved during the past year. It was emphasized that the responsibility of international organizations and State responsibility were the two pillars of international responsibility under a basically uniform system taking into account certain inherent differences between States and international organizations.

48. Support was given by some delegations to following the general pattern of the articles on State responsibility, with adaptations rendered necessary by the specificity and diversity of international organizations, the number and activities of which had increased to the extent that a set of general rules was justified. The assumption that the articles on State responsibility established a model template for the responsibility of international organizations was, however, criticized by some delegations, as was an automatic repetition of the articles adopted in 2001, given the fundamental differences between States and organizations and the diversity of the latter. It was suggested that extension by analogy with the regime of State responsibility should be limited to well-established rules, or that the Commission should focus its study on specific issues raised by the responsibility of international organizations and on problems faced by them in contemporary practice. The general nature of the draft articles made it necessary to scrutinize the meaning and scope of some of them.

49. As to the future consideration of the topic, support was expressed for the proposal to have some issues revisited by the Commission before the end of the first reading in the light of comments received and for the organization of a meeting of the Commission and legal advisers of international organizations.

2. Comments on specific draft articles

50. Several delegations expressed support for the draft articles dealing with the invocation of responsibility of an international organization. The lack of treatment of the invocation of the responsibility of a State by an international organization was emphasized, especially in cases of breaches of obligations owed to the international community as a whole.

Draft article 46: Invocation of responsibility by an injured State or international organization

51. The relationship between the right of an international organization to invoke responsibility, based on the implied powers doctrine, and the scope of its personality was emphasized. It was suggested that a distinction be drawn as to the possibility for an organization to invoke the responsibility of member States and third States. The view was also expressed that cases in which the obligation breached by an organization had an *erga omnes* character deserved attention in the context of draft article 46.

Draft article 48: Admissibility of claims

52. Support was expressed for the flexible approach, consisting in respecting the rules on the nationality of claims and the exhaustion of local remedies when

applicable. It was indicated that the rule of nationality of claims did not apply to cases of functional protection by an international organization of its officials. As to the rule regarding the exhaustion of local remedies, it was emphasized that only the available and effective remedies offered by international organizations, namely those including internal tribunals and bodies, should be exhausted. Some delegations called for further clarification of the notion of local remedies in that context.

Draft article 49: Loss of the right to invoke responsibility

53. Further clarification was called for as to the lapse of time necessary for the loss of the right to invoke responsibility and as to the identification of the organ competent to waive the claim of an organization. The need to take into account the rules of the organization concerning the competence to waive a claim was also emphasized.

Draft article 50: Plurality of injured States or international organizations

54. The absence of an indication of priority among entities injured by an act of an organization was noted. It was suggested that the Commission could stress the need for good-faith solutions on a case-by-case basis to avert the risk of concurrent claims.

Draft article 51: Plurality of responsible States or international organizations

55. In the case of a plurality of responsible States and international organizations, doubts were expressed as to the order of invocation of the primary responsibility of the organization and the subsidiary responsibility of its members. It was indicated that, at least for cases covered by draft articles 25 to 28, the injured State or organization should have the right to decide the order of invocation. Another view was that the primary responsibility of the organization should have precedence over the subsequent responsibility of member States to maintain a system different from that of joint and several liability. Some other delegations considered that States members of international organizations had no additional obligation to make reparation for the organization's wrongful act or that subsidiary responsibility remained subject to the characteristics and rules of the organization. Further elaboration of the reasoning was also called for on the basis of the specificities of mixed agreements and the intention of the parties regarding their implementation.

Draft article 52: Invocation of responsibility by a State or an international organization other than an injured State or international organization

56. The possibility for States or organizations other than the ones injured to invoke the responsibility of an international organization was endorsed by some delegations but questioned by others, at least in case of a breach of an obligation owed to the international community as a whole. Support was expressed for limiting the invocation of responsibility for breach of an obligation owed to the international community as a whole to those organizations which were, even implicitly, entrusted with the function of safeguarding the interests of the international community. It was also indicated that the invocation of responsibility by a non-injured party of a group should be subject to a consensus within that group as to the need to invoke responsibility and, more broadly, that organizations had a duty to cooperate to end a

serious breach by another organization, within the limits allowed by their constituent instruments.

Draft article 53: Scope of this part

57. The view was expressed that further study was needed regarding the possibility for individuals to invoke the responsibility of an international organization.

3. Countermeasures

58. Several delegations welcomed the inclusion of provisions on countermeasures. It was noted in that regard that international organizations would be limited in the fulfilment of their mandates if they were not given a restricted right to resort to countermeasures. A distinction should be made between preventing international organizations from taking countermeasures and limiting their use to cases of non-performance of conventional obligations by the injured organization. The view was expressed that in the case of a breach of an obligation owed to the international community, resort to countermeasures should be limited to organizations entrusted with the function of safeguarding the underlying general interest.

59. Other delegations, however, urged the Commission to reconsider the necessity of a separate chapter on countermeasures, emphasized the archaic character of the notion or questioned the opportunity of introducing specific provisions given the functions performed by international organizations in the centralization of the international community. It was suggested that the issue of countermeasures should have been dealt with in a distinct study. Several delegations recommended a cautious approach, avoiding the mere reproduction of the articles on State responsibility, in view of the limited practice and the uncertainties of the legal regime.

60. Reservations were expressed as to the possibility for member States to take countermeasures against a responsible organization, particularly given the scarcity in practice of such countermeasures; further clarification was called for in that regard. Some delegations considered that measures taken by members of the organization should primarily, if not exclusively, be governed by the rules of that organization. In any event, resort to countermeasures by member States should not hamper the functional competence of the organization for the general interest; in addition, the rights of States that had not supported the commission of the wrongful act by the responsible organization should be protected.

61. Several delegations noted that measures taken by an organization against its members should be regarded as sanctions rather than countermeasures and be governed by the rules of the organization. It was specifically emphasized that countermeasures should be distinguished from sanctions under the Charter of the United Nations. In any case, the relationship between an organization and its members should be treated differently from that between the organization and non-members, especially following breaches of *erga omnes* obligations. The view was expressed, however, that resort to countermeasures by an organization against its members, and vice versa, was possible, with due respect for the rules and means of performance provided by the organization.

62. It was also indicated that countermeasures taken by States against an international organization should be distinguished from those taken by other organizations and that the possibility for organizations other than the injured one to take countermeasures was doubtful.

63. On more specific issues, it was noted that the need to guarantee the inviolability of agents of international organizations should be limited to agents actually benefiting from such inviolability, and that countermeasures may not be taken in case of a dispute pending either before a court or tribunal or before another body having the power to make decisions binding on the parties.

E. Expulsion of aliens

1. General comments

64. While the importance of taking into account contemporary State practice — including relevant treaties and declarations — was underscored, some doubts were expressed regarding the suitability of this topic for codification and progressive development. It was said that no apparent need for codification existed in certain areas, such as labour migration.

2. Scope of the topic

65. It was stated that issues relating to non-admission, extradition, rendition and other transfers should be clearly excluded from the scope of the topic. The same view was expressed with regard to expulsions in situations of armed conflict and issues relating to the status of refugees, non-refoulement and the movement of populations.

66. Some delegations questioned the appropriateness of the Commission's dealing with issues relating to nationality, the expulsion of nationals, including those having more than one nationality, and denationalization in relation to expulsion. According to another point of view, the legal situation of persons with dual or multiple nationalities, as well as the issue of denationalization in relation to expulsion, deserved further study by the Commission.

67. It was observed that the Commission should, to the extent possible, avoid dealing with side issues such as the protection of the property rights of an expelled person.

3. Definitions

68. It was stated that the proposed definition of "territory" in draft article 2 as "the domain in which the State exercises all the powers deriving from its sovereignty" was vague and could give rise to overly expansive interpretations. The view was also expressed that no separate definition of the term "conduct", as suggested by the Special Rapporteur, was needed in relation to the definition of "expulsion". Moreover, it was proposed that the Commission clarify that the term "refugee" should be defined in accordance with each country's existing obligations.

4. Right of expulsion and its general limitations

69. Some delegations emphasized the need to establish a proper balance between the sovereign right of States to expel aliens and the limitations imposed on that right by international law, in particular those relating to the protection of human rights and to the treatment of aliens. It was also observed that the right of States to expel aliens entailed their corresponding obligation to readmit their own nationals.

70. It was stated that expulsion should be based on legitimate grounds, such as public order and national security, as defined in the domestic laws of the expelling State. The point was made that the draft articles should recognize that aliens unlawfully present in the territory of a State can be expelled for that reason alone and might be subject to different removal procedures.

5. Expulsion of nationals and the legal situation of persons with dual or multiple nationality

71. Some delegations expressed support for the view of the Special Rapporteur that it was not appropriate to elaborate draft articles dealing with nationality and, in particular, with the legal situation of persons having dual or multiple nationality regarding expulsion.

72. While some doubts were raised as to the appropriateness of including a draft article on the non-expulsion of nationals, several delegations underlined that the expulsion of nationals was prohibited under international law. It was also stated that the principle of non-expulsion of nationals was a basic human right recognized by customary international law. While some delegations pointed to the absolute character of the prohibition against the expulsion of nationals, others were of the opinion that certain derogations may be envisaged in exceptional circumstances. It was nevertheless said that any exception to that prohibition should be narrowly construed and carefully drafted.

73. Several delegations supported the Commission's conclusion that the principle of the non-expulsion of nationals applies also to persons who have legally acquired one or several other nationalities.[5] It was suggested that this point be reflected in draft article 4 or be clarified in the commentary. Some delegations also observed that the criterion of the "effective" or "dominant" nationality could not justify a State treating one of its nationals as an alien for purposes of expulsion. According to another view, the principle of the non-expulsion of nationals was ordinarily not applicable to those with dual or multiple nationalities, and there was also a need to clarify the notion of "effective" nationality.

6. Loss of nationality, denationalization and expulsion

74. Some delegations emphasized the right of every person to a nationality and the right not to be arbitrarily deprived of one's nationality. While the view was expressed that denationalization was prohibited by international law, some delegations were of the opinion that denationalization could be allowed in exceptional circumstances. It was stressed by some delegations that denationalization must not lead to statelessness; that it must take place in

[5] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 171.

conformity with national legislation; that it must be non-discriminatory; and that it must not be resorted to in an arbitrary or abusive manner. Some delegations agreed with the Commission's conclusion that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals,[5] and a proposal was made to include a draft article to that effect. Some delegations shared the view of the Special Rapporteur that it was not appropriate for the Commission to elaborate draft articles relating to the loss of nationality or denationalization in relation to expulsion. It was also stated that a reference in the commentary to the rules on nationality would suffice, considering that questions of loss of nationality or denationalization may arise independently of any subsequent expulsion.

7. Expulsion of refugees and stateless persons

75. It was suggested that the text of draft article 5, dealing with refugees, should follow more closely the language of the Convention relating to the Status of Refugees of 1951 and should take into account the distinction made therein between refugees lawfully and unlawfully present in the territory of the expelling State (see articles 31 and 32). It was observed that the principle of the non-expulsion of stateless persons, as enshrined in draft article 6, was not well established in international law.

8. Collective expulsion

76. The view was expressed that collective expulsion was contrary to international human rights law and, in particular, to the principle of non-discrimination.

9. Final form

77. It was suggested that the Commission focus its work on the development of a set of general principles, instead of elaborating draft articles purporting to codify customary law. It was also proposed that the Commission proceed, for the time being, to identify the key general principles relating to the subject, without prejudging the eventual form of the final product.

F. Protection of persons in the event of disasters

1. General comments

78. A number of delegations expressed support for the Commission's consideration of the topic, which would have practical benefits for populations in distress.

2. Scope of the topic

79. Some delegations expressed a preference for restricting the scope *ratione materiae* of the topic to natural disasters, excluding man-made disasters. Some other delegations preferred a more comprehensive approach covering both natural and man-made disasters. It was generally agreed that legal issues already covered by other areas of international law, including international humanitarian law and international environmental law, should be excluded from the purview of the topic.

80. As for the scope *ratione temporis*, several delegations spoke in favour of a more holistic approach, focusing on the various phases of a disaster: prevention, response and rehabilitation. Some other delegations expressed a preference for focusing initially on response measures, leaving the decision of whether to consider questions of prevention and preparedness for a later stage. The view was also expressed that the question of rehabilitation had no basis in international law.

81. Concerning the scope *ratione personae*, the point was made that the main concern should be to protect natural persons who were victims of such disasters; the inclusion of legal persons was to be contemplated at a later stage. It was also suggested that the protection of persons could encompass the protection of the property of victims. Furthermore, the scope *ratione loci* could be defined as encompassing disasters with transboundary effects.

3. Focus of the Commission's work

82. Several suggestions were made regarding the focus of the Commission's work, including defining the concept of protection and then determining the rights and obligations of the different actors involved in disaster situations under existing international law; considering the question of the rights and obligations of third States in relation to the right to humanitarian assistance and the responsibility to protect; analysing the legal issues involved in international cooperation in disaster relief; and identifying areas of common understanding on preventive measures, readiness and capacity-building, the coordination of relief and assistance, the provision of technical assistance and expertise to meet immediate humanitarian needs and appropriate cost-sharing arrangements between States providing and receiving disaster assistance. It was also suggested that the Commission could more clearly define the focus of the study, particularly the terms "protection" and "disaster".

83. Several delegations also supported taking a human rights-based approach covering the rights of both the victims and the affected States. Examples cited in relation to the former included the right to life, food, shelter and health, as well as non-discrimination. It was also suggested that there could be an analysis of which rights could be suspended in case of disaster and which rights could not, as well as the consequences of those rights, including their implementation and enforcement. It was further suggested that, in taking a rights-based approach, a balance needed to be struck between the interests of the victim, the donor States or non-State actors and the affected State. Some other delegations expressed doubts about taking a rights-based approach; such an approach might not be realistic in the light of the prevailing state of international law and could lead to a duplication of existing human rights instruments.

84. It was further proposed that the primary focus of the Commission's work should be on the right of the victims to humanitarian assistance. Several delegations reiterated the view that humanitarian assistance efforts should nonetheless be based on the principles of humanity, impartiality, neutrality and non-discrimination, as well as sovereignty and non-intervention.

85. It was maintained that the principles of sovereignty and non-intervention should not mean that a State affected by a disaster may deny victims access to assistance, and it was suggested that if the affected State was unable to provide the goods and services required for the survival of the population, it must cooperate

with other States or organizations willing and able to do so. Other delegations emphasized the importance of international assistance being provided to persons in the territory of the affected State only with that State's consent and under its supervision and solely on the basis of humanitarian considerations, without inappropriate political or other conditions being attached.

86. Attention was also drawn to the 2003 resolution on humanitarian assistance of the Institute of International Law, which had reflected a consensus that States were permitted to offer such assistance but could not render it without the consent of the affected State. It was also recalled that in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice had held that the provision of strictly humanitarian assistance to persons or forces in another country, whatever their political affiliations or objectives, could not be regarded as unlawful intervention or as in any other way contrary to international law.

87. Several delegations were of the view that the concept of responsibility to protect was relevant to the topic. Other delegations were of the view that the concept was not relevant to the topic, as the State concerned bore primary responsibility for the protection of persons in its territory or within its jurisdiction and because the concept was confined to extreme circumstances, such as persistent and gross violations of human rights, which could not automatically be applied to the topic of disaster relief. Still other delegations were of the view that a State's duty not to reject an offer of help arbitrarily and to allow access to victims could be deduced from human rights law, irrespective of any responsibility to protect.

4. Final form

88. Support was expressed for the approach of elaborating draft articles without prejudice to their final form. A preference was also expressed for the eventual instrument developed by the Commission taking the form of non-binding guidelines, in line with other relevant international instruments, such as the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, adopted at the thirtieth International Red Cross and Red Crescent Conference, in 2007. While reference was made to the importance of cooperation with other stakeholders, including the International Federation of Red Cross and Red Crescent Societies, the Commission was cautioned to avoid unnecessary duplication.

G. Immunity of State officials from foreign criminal jurisdiction

1. General comments

89. Some delegations emphasized the relevance of this topic and the usefulness of the codification effort by the Commission. The preliminary report of the Special Rapporteur was generally welcomed.

90. Some other delegations cautioned that the study of this topic by the Commission should take into account the balance of competing interests involved, namely, the prevention of impunity on the one hand and the stability of inter-State relations and the protection of the State's ability to perform its functions on the other.

2. Delimitation of the topic

91. Some delegations supported the delimitation of the topic proposed by the Special Rapporteur. They expressed their agreement with the proposal that the Commission should not examine the immunities of diplomatic agents, consular officials, members of special missions and representatives of States in and to international organizations, as well as issues of immunity of officials before their own State's jurisdiction. While some delegations supported the suggestion that the immunity of State officials before international criminal tribunals should be excluded from the scope of the topic, some other delegations were of the view that this question could not be ignored by the Commission.

92. While some delegations encouraged reference to State practice on immunity from foreign civil jurisdiction, some other delegations suggested that this issue was too different in nature from the present topic for such practice to be used.

3. Sources

93. Some delegations explicitly supported the Special Rapporteur's view that the source of the immunity of State officials from foreign criminal jurisdiction was not international comity but international law, particularly customary international law.

4. Immunity and jurisdiction

94. Some delegations indicated that the scope of the immunity of State officials should be determined by reference to its rationale, which was considered to be mainly functional. According to another view, the rationale for immunity was a combination of representative and functional necessity.

95. Some delegations agreed with the Special Rapporteur's statement that the issue of immunity may be studied without consideration of the substance of the question of jurisdiction as such. However, while some delegations encouraged an examination of the practice of universal jurisdiction, some other delegations noted that the latter should be excluded from the topic. Some delegations concurred with the Special Rapporteur that the immunity of State officials from foreign criminal jurisdiction was primarily procedural in nature. It was indicated that immunity constituted a limitation of the exercise of jurisdiction and did not imply positive duties.

96. Some delegations noted that immunity was effective throughout the course of criminal proceedings. Some other delegations expressed their interest in the Commission considering the effect of immunity in the pretrial phase and the question of inviolability of State officials.

97. It was suggested that a question that deserved further consideration was whether the immunity of State officials other than Heads of State, Heads of Government and foreign ministers had to be claimed actively by the officials' home State and whether the State thereby assumed responsibility for any wrongful act committed by that person. It was also emphasized that immunity did not release the State official from his or her obligation to abide by the law of the territorial State or from his or her criminal responsibility.

98. Some delegations noted that the immunity covered both the official and private acts of State officials and suggested that the Commission also study this distinction.

5. Persons covered

99. Some delegations supported the proposal that the Commission consider the immunity of all State officials, including former officials. Other delegations, on the contrary, suggested that the scope of officials covered by immunity should be more limited. The Commission was called upon to study further the categories of State officials enjoying immunity. In this regard, some delegations favoured a definition or specification of the concept of "State officials". It was emphasized that, in so doing, the Commission should distinguish the status of different categories of officials. According to one view, immunity did not continue after the expiration of an official's period of service.

100. It was suggested that the Commission should further explore the distinction between immunity *ratione materiae* and immunity *ratione personae* to determine the scope of immunities enjoyed by State officials.

101. With regard to immunity *ratione materiae*, some delegations were of the view that it covered all officials, while other delegations considered that certain categories of State officials did not enjoy immunity. It was suggested that the Commission could study the issue of immunity of military personnel stationed abroad.

102. Some delegations noted that immunity *ratione personae* was enjoyed by Heads of State, Heads of Government and foreign ministers. Some delegations argued that other high-ranking officials may also be covered by personal immunity. Some other delegations encouraged the Commission to explore this issue further to determine whether other categories of State officials enjoyed immunity under customary law and to find the relevant criteria for their identification. According to one view, personal immunity shall be limited to officials having a representative function.

103. Some delegations expressed the view that the relevant case law of the International Court of Justice, notably its judgments in the *Arrest Warrant* case and in the recent *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*) reflected the state of international law in the field.

104. While some delegations saw no merit in examining the question of recognition of States and Governments, others supported the study of the effects of non-recognition on the granting of immunity. It was suggested that the Commission could limit itself to including in the draft a savings clause on this issue.

105. Some delegations favoured consideration of the immunities of family members of State officials. Others were of the view that this question should not be addressed, since family members did not have immunity under customary international law, with the possible exception of the family of a Head of State. It was also suggested that the Commission could include a savings clause on the matter.

6. Exceptions to immunity

106. Some delegations supported further study by the Commission of the question of possible exceptions to immunity for serious international crimes. It was pointed out that the question of whether international crimes could be said to be committed in a non-official or private capacity was relevant in this regard. It was also noted that there were means by which impunity could be resisted, regardless of the

existence or otherwise of exceptions to the rule of immunity. Some other delegations, however, called for a cautious approach to this issue.

107. Some delegations affirmed that there was an exception to immunity in case of serious international crimes. It was argued by some delegations that this exception was limited to immunity *ratione materiae*.

108. Some delegations pointed to the relevance of the principle of universal jurisdiction in this regard. Others emphasized, however, that the abusive exercise of universal jurisdiction should be avoided.

109. It was further suggested that the Commission should determine the scope of immunity and possible exceptions to it on the basis of the jurisprudence of the International Court of Justice. Some delegations observed that, in addressing this issue, the Commission should also take into account the provisions relating to crimes punishable by international criminal tribunals and national legislation implementing the Rome Statute of the International Criminal Court. The view was expressed that the Commission should propose that future international criminal courts respect the immunities of State officials under customary international law and that charges for serious human rights violations should be brought only after a proper investigation has been conducted.

110. Some delegations encouraged the Commission to also examine other possible exceptions to the immunity of State officials. It was noted that spies and foreign agents carrying out unlawful acts in the territory of a State did not enjoy immunity from foreign criminal jurisdiction.

H. The obligation to extradite or prosecute (*aut dedere aut judicare*)

1. General comments

111. Some delegations highlighted that the obligation to extradite or prosecute contributed to the combat against impunity by denying safe havens to the persons accused of certain crimes. Other delegations welcomed the establishment by the Commission of a working group on the topic.

2. Customary character of the obligation

112. Some delegations considered that the source of the obligation to extradite or prosecute was not limited to international treaties and was customary in nature, notably for serious international crimes. Among the crimes referred to in this context by some delegations were piracy, slave trade, apartheid, terrorism, torture, corruption, genocide, crimes against humanity and war crimes. Other delegations, on the contrary, were of the view that the obligation did not exist beyond the provisions of international treaties. It was indicated, in this regard, that the customary character of the obligation could not necessarily be inferred from the existence of customary rules prohibiting specific international crimes. According to some delegations a customary rule might be in the process of emerging in the field. It was also noted that, in any event, the obligation would be applicable to a limited category of offences.

113. Some delegations supported further study by the Commission of the question of the possible customary source of the obligation and the crimes covered by it. It

was noted that, for this purpose, the Commission should rely on a systematic survey of the relevant State practice, including international treaties, domestic legislation and both national and international judicial decisions. While some delegations argued that a perceived lack of information from Governments should not delay the work of the Commission, other delegations urged the Commission to allow sufficient time to receive and evaluate information from Governments.

3. Scope and content of the obligation

114. Some delegations encouraged the Commission to continue to address the issues relating to the scope and implementation of the obligation, including its alleged alternative character and constitutive elements, the rights of States (including their right to refuse extradition) and the procedure for extradition. Other delegations endorsed the Commission's intention to address the scope of the obligation and the circumstances in which it arises. Some delegations expressed their interest in other issues relating to the topic, such as the question of when States could be considered to have exhausted the obligation. According to one view, the Commission should first study the procedural aspects of the implementation of the obligation, which may clarify substantive issues arising from the topic. For some delegations, due regard should be given to the sovereign right of States not to concede extradition. It was also noted that domestic prosecution of an alleged offender should be given priority when an extradition treaty did not provide otherwise.

4. Relationship to universal jurisdiction

115. Some delegations supported further work by the Commission on the link between the obligation to extradite or prosecute and universal jurisdiction. Other delegations doubted that the Commission should study universal jurisdiction in this context, either because they considered that universal jurisdiction was not a precondition for the existence of the obligation or because they saw no direct relationship between the two notions. According to another view, the obligation to extradite or prosecute and universal jurisdiction, while interrelated, should be dealt with separately.

5. Surrender of suspects to international criminal tribunals

116. Some delegations suggested that the Commission should consider the relevance of the surrender of suspects to international criminal tribunals for the implementation of the obligation to extradite or prosecute. Others were of the view that the Commission should refrain from examining the issue.

6. Draft articles proposed by the Special Rapporteur

117. With regard to draft article 1 proposed by the Special Rapporteur, the change in the title of the provision and the deletion of the adjective "alternative" were welcomed by some delegations. While some delegations approved the use of the phrase "under their jurisdiction", others considered that it could create controversy where States exercised extraterritorial jurisdiction and preferred the alternative formulation "present in the territory of the custodial State".

118. Concerning draft article 2, it was noted that its contents should not become definitive until the completion of the study by the Commission. It was suggested that the definition of "universal jurisdiction" also be included.

119. Some delegations expressed their agreement with draft article 3. The argument was made, however, that the provision was merely a restatement of the principle *pacta sunt servanda*. It was noted by some delegations that the provision should not be interpreted as prejudicing the question of whether the obligation to extradite or prosecute existed under customary international law or as implying that an extradition treaty would be a direct source of a duty to extradite, without the need for additional legislation.

I. Other decisions and conclusions of the Commission

120. Some delegations welcomed the Commission's contribution on the rule of law at the national and international levels.

121. With regard to new topics, several delegations noted with interest the inclusion of the topics "Treaties over time" and "The most-favoured-nation clause" in the programme of work of the Commission. Nevertheless, it has been pointed out that the studies on those topics should be carefully delimited and that their examination should not jeopardize the ongoing work. Doubt was expressed about the suitability of the topic "The most-favoured-nation clause" for progressive development or codification. A delegation also cautioned against a "one-size-fits-all" approach to the interpretation of the most-favoured-nation clause. The Commission was urged to delimit, but also to reconsider the scope of, the topic "Treaties over time" in order to strive for results of a more practical nature. It was mentioned that a guide based on practice in that area would be useful for States, international organizations and other experts involved in the elaboration and implementation of treaties.

122. The inclusion of other topics in the programme of work of the Commission was also proposed, such as "Law concerning migrations", "Functional protection" and "Legal mechanisms necessary for the registration of sales or other transfer of arms, weapons and military equipment between States". It has been suggested that the Commission considers the question of the regulation of the Internet in international law as well as the topic of *jus cogens*. However, caution against overburdening the agenda of the Commission was also recommended.

123. Several delegations welcomed the proposal to convene a meeting of legal advisers on a regular basis, at least once in a quinquennium. Furthermore, a proposal was made to hold a meeting with delegations on particular topics during the Commission's regular sessions.

124. While praising the special commemorative meeting organized in Geneva in May 2008 on the occasion of the sixtieth anniversary of the Commission, some delegations noted that they also commemorated the anniversary by convening seminars. A forthcoming event organized by the Asian-African Legal Consultative Organization was mentioned.

125. On the relationship between the Commission and the Sixth Committee, some delegations advocated greater engagement with legal advisers. A suggestion that one or two topics on the agenda of the Commission constitute a basis for detailed discussions during the informal meeting of legal advisers during the regular session

of the General Assembly received support. The institutionalization of the meeting with legal advisers was suggested. However, doubt was expressed about the benefits of convening a session of the Commission in New York.

126. The efforts to create a more user-friendly Commission report were commended. However, a longer interval was urged between the issuance of the report and the debate in the Sixth Committee in order to give the delegations more time to respond to the report adequately. Continued improvement of the website relating to the work of the Commission was also called for. Appreciation was expressed to the Codification Division for the substantive support it provided to the Commission and for the various studies undertaken.

127. Some delegations regretted that financial constraints impeded the attendance of special rapporteurs at meetings in which the Commission's report was discussed in the Sixth Committee. Support for the restoration of honorariums for special rapporteurs was expressed.

128. Finally, the fact that international organizations and the International Court of Justice were regularly consulted on matters of direct interest to them was applauded, and a call was made for the expansion of such consultations.

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Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-third session, prepared by the Secretariat

Addendum

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B. Effects of armed conflicts on treaties

1. General comments

1. Delegations welcomed the Commission's completion, on first reading, of the draft articles on the effects of armed conflicts on treaties. Delegations expressed general support for the position that armed conflict did not automatically suspend or terminate the operation of treaties.

2. Nonetheless, the view was expressed that the draft articles did not sufficiently take into account the distinction between treaties establishing boundaries and other treaties, which had been done in the 1969 Vienna Convention on the Law of Treaties ("Vienna Convention of 1969") and the 1978 Vienna Convention on Succession of States in Respect of Treaties. It was also pointed out that greater clarity was needed as regards: the effects of armed conflict on treaty relations among belligerent States as differentiated from treaty relations between belligerent and non-belligerent States (draft article 1); as well as the mechanism for the resumption of operation of suspended treaties (draft article 12). Other suggestions included: considering the interruption of treaty relations with third States, as well as linking the draft articles more clearly to articles 70 and 72 of the Vienna Convention of 1969.

3. It was suggested also that in order to complete its work on the effects of armed conflicts on treaties, the Commission should undertake a more thorough examination of relevant State practice, in particular national judicial decisions, especially the relevant practice and doctrine of civil law countries. It was proposed that the Commission establish a questionnaire seeking information on past and current State practice.

4. The point was also made expressing doubts as to the need to address the topic, as recent armed conflicts had apparently not led to problems in respect of the law of treaties.

2. Comments on specific draft articles

Draft article 1 — Scope

5. While support was expressed for the approach taken in draft article 1, several delegations called on the Commission to consider the question of the effects of armed conflicts on treaties involving international organizations. Some other delegations supported the exclusion of international organizations from the scope of the draft articles as they did not generally participate in armed conflicts.

6. It was also suggested that the draft articles could more usefully draw the distinction between relations among belligerent States and those between a belligerent and a third State, since the solutions would not necessarily be the same. It was proposed that to safeguard the legitimate interests of third parties in the event of an armed conflict, the solution in article 60 of the Vienna Convention of 1969 could be applied. It was also suggested that the case in which two States might be on the same side in an armed conflict should also be considered. According to another view, the scope of the topic should not cover situations in which only one party to the treaty was a party to an armed conflict.

7. According to other suggestions, it was proposed that the reference to the draft articles "applying to" the effects of an armed conflict in respect of treaties, be

replaced by "dealing with"; that it be clarified that the draft articles are without prejudice to the role of international humanitarian law as the "*lex specialis*" applying to armed conflict; and that the effects of armed conflict on provisionally applied treaties should be included within the scope of the draft articles.

Draft article 2 — Use of terms

8. Regarding the term "armed conflict", defined in subparagraph (b), it was noted it was defined for the purposes of the draft articles only. The view was also expressed that it was not necessary to include a definition of "armed conflict" in the draft articles, since the term belonged to the sphere of international humanitarian law and because the inclusion of a separate definition in treaty law might contribute to fragmentation of international law. Several delegations supported a clear indication in the draft articles that international humanitarian law was the *lex specialis* governing armed conflict.

9. Several delegations were of the view that the draft articles should deal only with international armed conflicts. It was maintained that the codification could become unmanageable if the definition of armed conflict was extended to cover all possible conflicts, including non-international and asymmetrical ones. It was recalled that the 2001 articles on responsibility of States for internationally wrongful acts, particularly the provisions on the circumstances precluding wrongfulness, might cover situations resulting from the non-application of treaties in a non-international armed conflict.

10. Some other delegations expressed support for the inclusion of internal conflicts within the scope of the draft articles, even if the effects of an internal conflict on treaty relations would not necessarily be the same as those of an international conflict. It was maintained that leaving internal armed conflict out of the draft articles would greatly limit their applicability, as most present-day armed conflicts were internal.

11. Concern was also expressed with regard to the use of the terms "occupation" and "armed conflict" — two separate concepts in the law of armed conflict — in the same provision.

12. It was noted that the term "state of war" could be replaced with "state of belligerency" or "the outbreak of hostilities between States".

Draft article 3 — Non-automatic termination or suspension

13. Delegations expressed general support for draft article 3, which was said to constitute the core of the draft articles and to be supported by customary international law as being essential in safeguarding the stability and certainty of treaty relations.

14. A preference was nevertheless expressed for reverting to the term "ipso facto", instead of "necessarily". It was also pointed out that neither "necessarily" nor "automatically" were synonyms for "ipso facto".

15. The view was also expressed that the omission of specific treatment of boundary treaties in draft article 3 risked sending the wrong message to States which harboured an intention to alter the demarcation of their borders.

Draft article 4 — Indicia of susceptibility to termination, withdrawal or suspension of treaties

16. A concern was expressed regarding the inclusion of the possibility of withdrawal as an option in draft article 4 as it seemed to contradict the content of draft article 3.

17. On subparagraph (a), reference was made to the fact that the grounds for termination and suspension provided in the Vienna Convention of 1969 should be regarded as fundamental and not merely supplementary. At the same time, it was noted that the reference to articles 31 and 32 of the Vienna Convention of 1969 was of little practical use because States did not necessarily have in mind the future possibility of armed conflict when concluding treaties.

18. As regards subparagraph (b), concern was expressed that the criteria set out therein appeared circular, as well as unconnected with the traditional grounds for terminating and suspending treaties (and if used arbitrarily could threaten the stability of treaty relations). It was suggested that the indicia be further considered, including: by adding criteria referring to the intensity and duration of the conflict; by referring not only to the subject matter of the treaty but also to its provisions; and by including a reference to the intention of the parties. Some other delegations expressed support for the Commission's decision to abandon the criterion of the intention of the parties. It was further noted that the internal or international nature of an armed conflict was one of the elements to be considered under subparagraph (b). It was also suggested that the text should more clearly specify that the criteria are indicative and not exhaustive.

Draft article 5 — The operation of treaties on the basis of implication from their subject matter, and annex thereto

19. While support was expressed for the general thrust of draft article 5, it was proposed that it expressly specify the general criteria which would lead to the implication that specific treaties would continue in operation during armed conflict. In was maintained that the list of categories of treaties in the annex was insufficient for that purpose. It was also proposed that the operation of specific treaties or parts thereof during an armed conflict should be considered on a case-by-case basis, and that the reference to specific treaty categories be made in the commentary. Some other delegations were of the view that the indicative list was useful, but called for further study, including with regard to the inclusion of multilateral law-making treaties, as well as for an express reference to the list in draft article 5.

20. As regards the content of the indicative list of categories, the view was expressed that its arrangement seemed illogical and needed to be modified. It was also suggested that treaties relating to international criminal law, establishing or modifying river boundaries, dealing with international transport, as well as embodying *jus cogens* norms be included.

Draft article 6 — Conclusion of treaties during armed conflict

21. As regards paragraph 2, the inclusion of the word "lawful" was queried and its deletion was suggested. It was also suggested that the commentary could indicate that the provision was without prejudice to draft article 9, Obligations imposed by international law independently of a treaty.

Draft article 7 — Express provisions on the operation of treaties

22. A proposal was made that draft article 7 also provide that any treaty provisions must be regarded as decisive, whether they envisaged the treaty continuing in operation or expressly provided for the contrary. It was also suggested that the provision be located after draft article 4, as an example of subparagraph (a) of that provision, as well as being closer to draft article 5, which dealt with the opposite situation. According to another view, the provision could be deleted as being superfluous.

Draft article 8 — Notification of termination, withdrawal or suspension

23. While some delegations expressed support for draft article 8, some other delegations raised doubts. For example, the concern was expressed that, since no specific exception for boundary treaties had been included in the draft articles as a whole, armed conflict could provide the pretext for States wishing to terminate, withdraw from or suspend such treaties. It was further proposed that, since the draft articles covered the position of third States, provision ought also to be made for the obligation to notify such third States of an intention to terminate or withdraw from a treaty as a result of armed conflict. In addition, the Commission was called upon to reconsider its preference for not including a reference to the peaceful settlement of disputes in the provision.

24. On paragraph 1, it was queried whether it would always be practical for a State party that intended to withdraw from or terminate a treaty to carry out its obligation to notify other States parties of its intention, particularly if the other State party or other States parties or the depositary were belligerents. In addition, it was proposed that the initial right of a party to an armed conflict to give such notification be limited to treaties not covered by draft article 5.

25. It was proposed that paragraph 2 be made subject to the proviso "unless the notice states otherwise".

26. The view was expressed that paragraph 3 was insufficiently clear on the effects of an objection by a State to the termination or suspension of a treaty and could create ambiguity as to the fate of the treaty.

Draft articles 9 to 18 — Remaining draft articles

27. While support was expressed for draft articles 9, Obligations imposed by international law independently of a treaty, and 10, Separability of treaty provisions, it was suggested that the structure of draft article 10, and its relationship with draft article 5, required further study.

28. On draft article 11, Loss of the right to terminate, withdraw from or suspend the operation of a treaty, it was queried whether subparagraph (a) was too rigid, and it was proposed that the relationship between draft articles 11 and 17, Other cases of termination, withdrawal or suspension, be clarified.

29. As regards draft article 12, Resumption of suspended treaties, it was pointed out that it was unclear whether the decision to resume the operation of the treaty was the unilateral decision of the party which suspended its operation or whether the other parties to the treaty would also be involved. It was also suggested that draft

articles 12 and 18, Revival of treaty relations subsequent to an armed conflict, be located next to each other.

30. Support was expressed by some delegations for draft article 13, Effect of the exercise of the right to individual or collective self-defence on a treaty. Nonetheless, it was noted that the discretion to suspend treaty relationships, in the context of the use of force in the exercise of the right to self-defence, should be strictly limited so as to support the stability of treaty relations. It was also wondered why a State exercising its right of individual or collective self-defence could only suspend the operation of a treaty, but not withdraw from or terminate it. A preference was expressed for the version adopted by the Institute of International Law in 1985, which had included a reference to a later determination by the Security Council of the existence of an act of aggression.

31. While support for draft article 14, Decisions of the Security Council, was expressed by some delegations, it was also proposed that the provision could be deleted as being superfluous, or because it dealt with matters outside the mandate of the Commission.

32. Support was expressed by some delegations for draft article 15, Prohibition of benefit to an aggressor State. It was suggested that the Commission ought to keep in mind that other definitions of the term "aggression" were being developed, including in the context of an impending review of the Rome Statute of the International Criminal Court. It was also pointed out that it was necessary to clarify the situation where an aggressor State purported to withdraw from a treaty or suspend its application in accordance with that treaty, thus establishing a conflict between draft article 15 and the relevant provisions of the treaty. According to another view, the question of possible benefit to an aggressor State should be regarded as a relevant consideration but not necessarily a decisive one.

33. As regards draft article 16, Rights and duties arising from the laws of neutrality, the point was made that it was not clear why the laws of neutrality should be treated in a separate article rather than being included in the indicative list of categories of treaties referred to in draft article 5.

34. It was proposed that to the grounds listed in draft article 17, Other cases of termination, withdrawal or suspension, one could add the provisions of the treaty itself.

35. As regards draft article 18, Revival of treaty relations subsequent to an armed conflict, it was noted that it was unclear why withdrawal was omitted from the provision. It was also suggested that the relationship with draft article 12 needed to be clarified.

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Shared natural resources

Comments and observations received from Governments

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I. Introduction

1. At its fifty-ninth session (2007), the International Law Commission requested the Secretariat circulate to Governments a questionnaire, prepared by the Working Group on Shared Natural Resources, seeking information on State practice, in particular treaties or other arrangements existing regarding oil and gas.[1] In a circular note dated 17 October 2007, the Secretariat transmitted the questionnaire to Governments.

2. As at 31 January 2009, responses to the questionnaire had been received from the following 17 States: Algeria, Argentina, Australia, Austria, Bahamas, Bosnia and Herzegovina, Canada, Chile, the Czech Republic, Ireland, Mali, Mauritius, the Netherlands, Oman, the Republic of Korea, Tunisia and Turkey. The responses are contained in the present report and are organized, to the extent possible, on the basis of the questions contained in the questionnaire.

II. Comments and observations on the questionnaire on oil and gas received from Governments

A. General comments

Canada

3. A number of bilateral maritime delimitation agreements concluded internationally incorporate provisions regarding the possibility of finding a natural resource that straddles across a maritime boundary, as well as a procedure to be followed in the event of such a discovery. The obligations generally focus firstly on advising the other State that a transboundary field has been discovered, and secondly, on the necessity for States to seek to reach an agreement on some form of joint exploitation.

4. For the purposes of the present questionnaire, however, Canada will focus on the *only* agreement that Canada has entered into relating to the exploration and exploitation of transboundary hydrocarbons, entitled the Agreement between the Government of Canada and the Government of the French Republic relating to the Exploration and Exploitation of Transboundary Hydrocarbon Fields. The Agreement governs the apportion of the reserves found in transboundary hydrocarbon fields straddling the maritime boundary between Canada and France.

5. Canada would like to note that providing answers to the Commission should not be interpreted as either agreement or acquiescence by Canada for the Commission to provide a set of draft articles on a subject matter, such as oil and gas, that is essentially bilateral in nature, highly technical, politically sensitive, encompasses diverse regional situations and requires a case-by-case solution.

6. Canada considers that any matters relating to offshore boundary delimitation should not be considered by the Commission.

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[1] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 159.

Republic of Korea

7. The Republic of Korea considers that the valuable work on this topic [Shared natural resources] by the International Law Commission represents a timely contribution to the progress development through codification in this field of law.[2]

8. An important decision is before the Commission as to whether it needs to move beyond transboundary aquifers and then to deal also with other shared natural resources. It is advisable that the Commission exercise caution in this matter. States and industries have immense economic and political stakes in the allocation and regulation of oil and gas resources, and any proposal by the Commission is likely to be highly controversial. States in the international community already have considerable experience and practices in dealing with transboundary oil and gas reservoirs. It is doubtful whether the Commission should go beyond the issue of transboundary aquifers.

9. The Republic of Korea entered "none" on comments and observations on the questionnaire on shared resources.

B. Question 1

Do you have any agreement(s), arrangement(s) or practice with your neighbouring State(s) regarding the exploration and exploitation of transboundary oil and gas resources or for any other cooperation for such oil or gas?

Such agreements or arrangements should include, as appropriate, maritime boundary delimitation agreements, as well as unitization and joint development agreements or other arrangements. Please provide a copy of the agreement(s) or arrangement(s) or describe the practice.

Algeria

10. There are no agreements regarding the exploration and exploitation of transboundary deposits. However, on 29 December 2005 a framework agreement was signed between the Algerian national company Sonatrach and the Libyan national company, the National Oil Corporation, to launch a joint study on the exploitation of the deposits at Alrar in Algeria and Wafa in the Libyan Arab Jamahiriya.

Argentina

11. Agreements in force for the Argentine Republic that relate to oil and gas within the "Shared natural resources" framework include:[3]

(a) Supplementary Agreement to the Treaty concerning the Río de la Plata and the Corresponding Maritime Boundary regarding the line marking the maritime lateral limit, the common fishing zone and the common area within which the

[2] The reply by the Republic of Korea also included comments on the Commission's draft articles on the law of transboundary aquifers, which have been omitted.

[3] The texts of the agreements, in Spanish, are available for consultation at the Codification Division of the Office of Legal Affairs.

discharge of hydrocarbons and other polluting actions are prohibited, signed: Montevideo, 15 July 1974; entry into force: 15 July 1974;

(b) Cooperation Agreement between the Argentine Republic and the Eastern Republic of Uruguay to prevent and combat incidents of contamination of the aquatic environment by hydrocarbons and other harmful substances, signed: Buenos Aires, 16 September 1987; enactment: Act No. 23,829; entry into force: 29 October 1993;

(c) Additional Specific Protocol between the Argentine Republic and the Republic of Chile on protection of the Antarctic environment, signed: Buenos Aires, 2 August 1991; entry into force: 17 November 1992;

(d) Treaty between the Argentine Republic and the Republic of Bolivia on the environment, signed: Buenos Aires, 17 March 1994; enactment: Act No. 24,774; entry into force: 1 June 1997;

(e) Agreement between the Argentine Republic and the Federative Republic of Brazil on cooperation in environmental matters (with Annex A), signed: Buenos Aires, 9 April 1996; enactment: Act 24,930; entry into force: 18 March 1998;

(f) Additional Protocol to the Treaty on the Environment between the Government of the Argentine Republic and the Government of the Republic of Bolivia, signed: Tarija, 22 July 2004; entry into force: 22 July 2004;

(g) Memorandum of Understanding between the Argentine Republic, the Republic of Bolivia and the Eastern Republic of Uruguay on energy and economic integration, signed: Brasilia, 20 August 2004; entry into force: 20 August 2004;

(h) Additional Protocol to the Agreement of Partial Scope on energy integration between Argentina and Bolivia for the supply of natural gas from the Republic of Bolivia to the north-east Argentina gas pipeline, signed: Sucre, 14 October 2004; entry into force: 27 May 2005;

(i) Framework Agreement between the Argentine Republic and the Republic of Bolivia for the sale of natural gas and the implementation of energy integration projects, signed: Buenos Aires, 29 June 2006; entry into force: 29 June 2006;

(j) Agreement for work to be started on the north-east Argentina gas pipeline and natural gas liquids plant (Republic of Bolivia), signed: Santa Cruz de la Sierra, 26 March 2007;

(k) Framework Agreement between the Argentine Republic and the Republic of Bolivia on energy integration, signed: Tarija, 10 August 2007;

(l) Financing Agreement between the Argentine Republic and the Republic of Bolivia: Pre-investment and construction studies for the natural gas liquids plant and associated distribution and marketing system, signed: Tarija, 10 August 2007; entry into force: 10 August 2007;

(m) Organization of South American Gas Producing and Exporting Countries (OPPEGASUR): Tarija agreement on gas integration between the Bolivarian Republic of Venezuela, the Argentine Republic and the Republic of Bolivia, within the framework of OPPEGASUR, signed: Tarija, 10 August 2007;

(n) Cooperation Agreement between the Eastern Republic of Uruguay and the Argentine Republic on energy-related matters, signed: Buenos Aires, 5 July 2007.

Australia

12. Australia is an island State with a lengthy coastline. It has a number of bilateral maritime delimitations with its neighbouring States. Several of these delimitation treaties include a provision that deals with the possibility of finding a natural resource that straddles across a boundary. The provisions are all similar to the following:

> "If any single accumulation of petroleum, whether in a gaseous, liquid or solid state, or if any other mineral deposit beneath the seabed, extends across the lines described in [the] Treaty, and the part of such accumulation or deposit that is situated on one side of the line is recoverable wholly or in part from the other side of the line, the two Parties will seek to reach agreement on the manner in which the accumulation or deposit shall be most effectively exploited and on the equitable sharing of the benefits arising from such exploitation."

13. The bilateral treaties between Australia and its neighbours and their relevant provisions include the following (together with links to websites where the treaties can be found online):

(a) Treaty between the Government of Australia and the Government of New Zealand establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries (art. 4), done at Adelaide on 25 July 2004 (in force 25 January 2006) (also available from http://www.austlii.edu.au/au/other/dfat/treaties/2006/4.html);

(b) Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries (art. 7), done at Canberra on 18 May 1971 (in force 8 November 1973), United Nations, *Treaty Series*, vol. 974, No. 14122 (also available from http://www.austlii.edu.au/au/other/dfat/treaties/1973/31.html);

(c) Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971 (art. 7), done at Jakarta on 9 October 1972 (in force 8 November 1973), United Nations, *Treaty Series*, vol. 974, No. 14123 (also available from http://www.austlii.edu.au/au/other/dfat/treaties/1973/32.html);

(d) Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters (art. 6), done at Sydney on 18 November 1978 (in force 15 February 1985) ("Torres Strait Treaty"), United Nations, *Treaty Series*, vol. 1429, No. 24238 (also available from http://www.austlii.edu.au/au/other/dfat/treaties/1985/4.html);

(e) Agreement between the Government of Australia and the Government of Solomon Islands establishing Certain Sea and Seabed Boundaries (art. 2), done at Honiara on 13 September 1988 (in force 14 April 1989), United Nations, *Treaty*

Series, vol. 1536, No. 26661 (also available from http://www.austlii.edu.au/au/other/dfat/treaties/1989/12.html);

(f) Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries (art. 9), done at Perth on 14 March 1997 (not yet in force) ("Perth Treaty"), *International Legal Materials*, vol. 36, p. 1053 (also available from http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/1997/4.html).

14. There are currently no known offshore oil and gas resources that exist across the boundaries established by the treaties mentioned above.

15. Australia and Timor-Leste have not established permanent maritime boundaries but have a number of interim treaties in force that provide for practical maritime arrangements between them. The Timor Sea Treaty, done at Dili on 20 May 2002 (in force 2 April 2003), establishes an area of joint petroleum development in the Timor Sea. The Treaty provides that Australia and Timor-Leste are to jointly control, manage and facilitate the exploration, development and exploitation of the petroleum resources of the joint area for the benefit of the peoples of Australia and Timor-Leste. The Treaty can be found at: http://www.austlii.edu.au/au/other/dfat/treaties/2003/13.html.

16. Australia and Timor-Leste have a unitisation agreement between them that applies to the "Greater Sunrise" field that lies in both the joint development area and an area in which Australia regulates activities in relation to the resources of the seabed and subsoil: Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubador Fields, done at Dili on 6 March 2003 (in force 23 February 2007). The Agreement can be found at: http://www.austlii.edu.au/au/other/dfat/treaties/2007/11.html.

17. Further information on the maritime arrangements between Australia and Timor-Leste can be found at: http://www.dfat.gov.au/geo/east_timor/fs_maritime_arrangements.html.

Austria

18. Austria has concluded only one agreement on the exploration of transboundary oil and gas resources: the Agreement between the Austrian Federal Government and the Government of Czechoslovakia on the exploitation of the common oil and gas deposits (23 January 1960), now being in force between Austria and the Czech Republic, and Austria and the Slovak Republic.[4]

19. The cooperation with the Czech Republic has already come to an end, since the oil and gas resources have already been fully exploited. The cooperation with the Slovak Republic will come to an end within the next few years, since these resources are about to be fully exploited.

[4] The text of the agreement, in German, is available for consultation at the Codification Division of the Office of Legal Affairs.

Bahamas

20. Presently the Bahamas does not have any such agreements or arrangements with neighbouring States, but it realizes the true importance of having such legally binding treaties. The Bahamas commenced work on its archipelagic baseline with the use of United Nations-approved software (CARISLOTS), which would produce the median line between the Bahamas and its neighbouring States. The Government's intention is to submit these baseline coordinates to the United Nations by April 2008.

Bosnia and Herzegovina

21. Bosnia and Herzegovina responded "No". At the moment there is no such agreement or arrangement between Bosnia and Herzegovina and the neighbouring States.

Canada

22. Pursuant to the decision of the Arbitral Tribunal in the *Case concerning the Delimitation of Maritime Areas between Canada and the French Republic of June 10, 1992*, Saint-Pierre-et-Miquelon only has jurisdiction over a narrow strip of maritime area that is 10 nautical miles in width and extends 200 nautical miles south of the islands, which is completely enclosed by Canada's exclusive economic zone.

23. As the 1992 Arbitral Tribunal definitively decided the permanent boundary between Canada and France (for Saint-Pierre-et-Miquelon) for all purposes, a need was felt for an agreement triggered by the possibility of petroleum fields straddling the Canadian-French boundary. Canada approached France in 1998 to suggest that both sides enter into a treaty to manage possible transboundary fields. Finally, in 2005, Canada and France signed an agreement to provide a management regime for hydrocarbon exploration and exploitation offshore Newfoundland, Nova Scotia and Collectivite de Saint-Pierre-et-Miquelon. The Agreement between the Government of Canada and the Government of the French Republic relating to the Exploration and Exploitation of Transboundary Hydrocarbon Fields, containing 21 articles and 6 annexes, recognizes the need for a common approach to oil and gas management to ensure the conservation and management of hydrocarbon resources that straddle the maritime boundary, to apportion between the two countries the reserves found in transboundary fields and to promote safety and the protection of the environment.

24. The Agreement acknowledges that nothing is to prejudice or restrict the sovereignty or jurisdiction of either party over their respective internal waters and territorial seas, or the exercise of sovereign rights, in accordance with international law, over their respective exclusive economic zones.

25. The Agreement was inspired by the 1976 Markham Agreement, which was used as a "framework" arrangement adapted to Canadian and French respective circumstances.

26. The Agreement has yet to enter into force, and Canada would therefore refrain from disclosing it at this time. That said, the relevant paragraphs will provide a general outline of the Agreement.

Chile

27. The only international agreement concluded by the Republic of Chile in relation to this subject area is the Treaty with the Argentine Republic on Mining Integration and Complementarity, signed on 29 December 1997 and currently in force.[5]

28. While the Treaty was not intended to address integration or complementarity in relation to hydrocarbons, its content does not exclude that possibility. In any event, it should be noted that the treatment of hydrocarbons exploitation in Chile's domestic legislation differs from the regime governing metallic and some non-metallic minerals. Whereas hydrocarbons are subject to State concessions or special operating contracts, minerals can be subject to mining concessions under the Chilean Mining Code.

29. In addition, it should be noted that the scope of application of the above-mentioned Treaty is geographically limited to the area defined by the set of coordinates listed in annex I to the Treaty and represented on the reference map contained in annex II. This area excludes any and all maritime areas and island territories, as well as the coastline as defined in each State party's domestic legislation.

Czech Republic

30. An Agreement between the Government of the Czechoslovak Republic and the Austrian Federal Government on the Exploitation of Shared Natural Gas and Oil Deposits, negotiated in 1960, specified the international legal and technical parameters for the exploitation of deposits of these raw materials. The shared deposits concerned were at Vysoká pri Morave (now in the territory of Slovakia), Zwerndorf (in the territory of Austria), and in Nový Přerov (now in the territory of the Czech Republic) and Altprerau (in the territory of Austria).

31. After its establishment in 1993, the Czech Republic succeeded to the 1960 Agreement between the Government of the Czechoslovak Republic and the Austrian Federal Government on the Exploitation of Shared Natural Gas and Oil Deposits.

Ireland

32. Ireland responded "Yes" — article 3 of the Agreement between the Government of Ireland and the Government of the United Kingdom concerning the Delimitation of Areas of the Continental Shelf between the Two Countries, signed at Dublin on 7 November 1988, and entered into force on 11 January 1990, specifically deals with cross-boundary fields.

33. This Agreement was supplemented by the Protocol supplementary to the Agreement between the Government of Ireland and the Government of the United Kingdom concerning the Delimitation of Areas of the Continental Shelf between the Two Countries of 7 November 1988, done at Dublin on 8 December 1992.[6] The Agreement referred to above, as supplemented, is a Maritime Boundary

[5] The text of the treaty, in Spanish, is available for consultation at the Codification Division of the Office of Legal Affairs.

[6] The texts of the agreement and the protocol thereto, in English, are available for consultation at the Codification Division of the Office of Legal Affairs.

Delimitation Agreement. No unitization or joint development agreements have been necessary to date. Drilling in the Irish sector is not permitted within 125m of any boundary line.

34. An oil and gas discovery (named Dragon) in the St. George's Channel area was for a time a candidate for development and part of the structural closure was mapped as crossing the agreed continental shelf boundary between Ireland and the United Kingdom. Preliminary discussions were held with counterparts in the United Kingdom prior to appraisal drilling but since the appraisal drilling was not successful no further discussions took place and Ireland understands there are currently no plans for further drilling or development.

Mali

35. With the exception of the Framework Agreement on Cooperation signed with Mauritania, which covers, among other things, exploration, production, transport, storage and refining activities in the sedimentary basins shared by the two countries (Nara and Taoudéni), no other such agreement or arrangement has been signed or concluded between Mali and its other neighbours. A framework agreement covering only training and exchanges of information and experience has been signed with Senegal.

Mauritius

36. Mauritius responded "No".

Netherlands

37. The Netherlands has concluded the following bilateral agreements relating to shared natural resources:[7]

(a) Supplementary Agreement between the Kingdom of the Netherlands and Federal Republic of Germany of 14 May 1962 to the Treaty of 8 April 1960 concerning arrangements for cooperation in the Ems Estuary (Ems-Dollard Treaty) (United Nations, *Treaty Series*, vol. 509, No. 7404);

(b) Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland of 6 October 1965 relating to the Exploitation of Single Geological Structures extending across the Dividing Line on the Continental Shelf under the North Sea (United Nations, *Treaty Series*, vol. 595, No. 8615);

(c) Agreement between the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland of 26 May 1992 relating to the Exploitation of the Markham Field Reservoirs and the Offtake of Petroleum therefrom (United Nations, *Treaty Series*, vol. 1731, No. 30235);

(d) Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands of 25 July 2007 concerning the Minke Main Development (not published).

[7] The texts of the published agreements, in English, are available for consultation at the Codification Division of the Office of Legal Affairs.

Oman

38. Oman responded "Yes". There are arrangements regarding oil, gas and minerals between the Government of the Sultanate of Oman, represented by the Ministry of Oil and Gas, and some neighbouring States, such as the United Arab Emirates, Yemen and the Islamic Republic of Iran. However, no agreements have yet been signed regarding the joint utilization or development of any shared fields.

39. There are maritime boundary delimitation agreements, but such agreements are within the purview of the Ministry of the Interior.

Turkey

40. Turkey does not have any agreement, arrangement or practice with its neighbouring States regarding the exploration and exploitation of transboundary oil/gas resources.

C. Question 2

Are there any joint bodies, mechanisms or partnerships (public or private) involving exploration, exploitation or management of the transboundary oil or gas? Please provide information describing the nature and functioning of such arrangements, including governing principles.

Australia

41. The Timor Sea Treaty establishes a joint management and regulation regime for the joint development area in the Timor Sea. The Timor Sea Designated Authority is the day-to-day regulator of the joint area and is based in Dili. Its website can be found at: http://timorseada.org/.

42. The Designated Authority is responsible to a Joint Commission, currently constituted by two Timor-Leste officials and one Australian official, which oversees the work of the Designated Authority and establishes policies and regulations relating to petroleum activities in the joint area. The ultimate decision-making body established by the Timor Sea Treaty is a Ministerial Council, constituted by an equal number of ministers from Australia and Timor-Leste. The Designated Authority, Joint Commission and Ministerial Council operate in accordance with the terms of the Timor Sea Treaty.

Austria

43. The above-mentioned agreement (see para. 18 above) provides for a "mixed committee" which is composed of a representative of the Austrian Federal Ministry of Economics and Labour and a representative of the OMV oil and gas corporation on the Austrian side, and a representative of the Slovak Ministry of Economics and a representative of the NAFTA company on the Slovak side. This committee decides, among others, on the share of the oil and gas — which is exploited exclusively on Austrian territory — to be given to the Slovak side.

Bahamas

44. There are no such joint programmes, mechanisms or partnerships concerning exploration or management of transboundary oil or gas in the Bahamas.

Bosnia and Herzegovina

45. Bosnia and Herzegovina does not have any local or transboundary sources of gas or oil, or contract related to that issue. There were certain researches regarding sources of crude oil in Bosnia and Herzegovina by 1990, but they have never been exploited.

Canada

46. The Agreement between the Government of Canada and the Government of the French Republic relating to the Exploration and Exploitation of Transboundary Hydrocarbon Fields envisages the creation of a joint Technical Working Group to examine technical issues that arise from the implementation of the Agreement or from any Exploitation Agreement (explained further below), including information related to the regional geological setting and geological basins as well as any question related to the implementation of the Development Plan or Benefits Plan (explained further below). The Working Group must allow the Parties to review information related to the regional geological setting and, at the request of one Party, meet to facilitate approval of a Development Plan or Benefits Plan by reviewing concerns or issues regarding such a plan or a preliminary version of it. The Unit Operator is normally to be invited to all or part of any such meetings.

47. The Working Group consists of individuals nominated by each Party (two Chairs and two Secretaries), as well as other persons which either Party considers should be present at any Working Group meeting.

Czech Republic

48. In conformity with the 1960 Agreement between the Government of the Czechoslovak Republic and the Austrian Federal Government on the Exploitation of Shared Natural Gas and Oil Deposits, there existed a Czechoslovak-Austrian Mixed Commission defined in article 2 of the said Agreement. The Mixed Commission was composed of representatives of the two contracting parties. The task of the Mixed Commission was to calculate the total reserves in individual deposits and to specify the share of each contracting party, to specify the conditions for exploitation, in particular to establish long-term exploitation programmes, as well as the ways of removing potential difficulties that might arise within the implementation of the Agreement.

49. The Czechoslovak side was represented in the Mixed Commission by representatives of the competent ministry and by the Nafta Hodonín mining company. After the disintegration of Czechoslovakia, a Czech-Austrian Mixed Commission was set up to continue to fulfil the tasks arising from the 1960 Agreement between the Government of the Czechoslovak Republic and the Austrian Federal Government on the Exploitation of Shared Natural Gas and Oil Deposits. Participating in the work of the Mixed Commission on the Czech side are representatives of the Ministry of Industry and Trade and of the Moravské naftové doly mining company.

Hungary

50. The Hungarian Oil and Gas Company (MOL) has concluded two partnership agreements with the Croatian National Oil and Gas Company (INA) to jointly explore cross-border Croatian-Hungarian plays. One of the agreements covers the Podravska Slatina-Zalata area (signed in 2006), the other agreement concerns the Novi Gradac-Potony area (signed in 2007). Both companies have 50-50 share in the exploration projects. The partnership is governed by the Management Committee, which consists of the representatives of MOL and INA, and all decisions are made on a consensual basis. The Steering Committee decides on the annual work programme and the necessary budget. INA is the operator on the Croatian side, and MOL undertakes the responsibilities and tasks of the operator on the Hungarian side. The agreements are governed by the English law.

Ireland

51. Not at the moment. However, Ireland is in regular contact with its counterparts in the United Kingdom (Department for Business, Enterprise and Regulatory Reform (BERR, formerly Department of Trade and Industry)) regarding issues of mutual interest. Ireland responded "Not applicable" to the question "Please provide information describing the nature and functioning of such arrangements, including governing principles".

Mali

52. A steering committee comprising representatives of Mali and Mauritania has been established to implement the Framework Agreement on oil-related activities in the shared sedimentary basins.

53. The steering committee meets at least twice annually or as necessary to consider project and budget proposals for activities within a mutually agreed area.

Mauritius

54. Mauritius responded "No".

Netherlands

55. The Netherlands responded "No".

Oman

56. The Ministry of Oil and Gas is not involved with any joint bodies, mechanisms or partnerships (public or private) engaged in the exploration, exploitation or management of transboundary oil or gas.

57. However, there are understandings on bilateral exchange of technical information. Such understandings are implemented as needed by companies on both sides under the supervision of the Ministry.

Turkey

58. Turkey does not have joint bodies, mechanisms or partnerships involving exploration, exploitation or management of the transboundary oil or gas.

D. Question 3

If the answer to question 1 is yes, please answer the following questions on the content of the agreements or arrangements and regarding the practice:

(a) Are there any specific principles, arrangements or understandings regarding allocation or appropriation of oil and gas, or other forms of cooperation? Please provide a description of the principles, provisions, arrangements or understandings;

(b) Are there any arrangements or understandings or is there any practice regarding prevention and control of pollution or regarding other environmental concerns, including mitigation of accidents? Please provide further description.

Algeria

59. There is an agreement of friendship and cooperation between the Algerian and Libyan Arab Jamahiriya Governments regarding the development and exploitation of the deposits at Alrar and Wafa.

60. The firm Oil Spill Response Company (OSPREC) was created in January 2007. Its shareholders include Algeria and Morocco, soon to be joined by Tunisia. The firm's objective is to prevent and combat hydrocarbon pollution in an area extending from the southern Mediterranean coast to the west coast of Africa.

Australia

61. In relation to question 3 (a), the provisions quoted above (see para. 12 above) in several of Australia's delimitation agreements make it clear that for any transboundary petroleum resource found, the two parties are to seek to reach agreement on the manner in which the resource is to be most effectively exploited and on the equitable sharing of the benefits arising from such exploitation.

62. In relation to question 3 (b):

(a) In those areas where Australia exercises seabed jurisdiction and Indonesia exercises water column jurisdiction, the parties will be required by article 7 of the Perth Treaty, when it enters into force, to take effective measures as may be necessary to prevent, reduce and control pollution of the marine environment;

(b) Article 13 of the Torres Strait Treaty between Australia and Papua New Guinea provides obligations on the parties to protect and preserve the marine environment in and in the vicinity of the Protected Zone. Under article 15, Australia and Papua New Guinea have agreed to extend a moratorium on mining and drilling of the seabed and subsoil for the exploration or exploitation of the resources within the Protected Zone for an indefinite period;

(c) Article 10 of the Timor Sea Treaty places obligations on Australia and Timor-Leste to cooperate to protect the marine environment of the joint petroleum development area, so as to prevent and minimize pollution and other environmental harm from petroleum activities. In the Greater Sunrise unit area, article 21 of the unitization agreement between Australia and Timor-Leste provides that certain specified Australian environmental protection legislation will apply and will be administered by the regulatory authorities designated by the unitization agreement;

(d) The Australian Maritime Safety Authority, responsible for maritime safety, marine environment protection, and maritime and aviation search and rescue in Australia, has several memorandums of understanding with Australia's neighbours (New Caledonia, New Zealand, Papua New Guinea and Indonesia) which relate to responses to major oil spills.

Austria

63. Since the gas is exploited exclusively on Austrian territory, Austrian laws and regulations apply.

64. There are no specific arrangements.

Bahamas

65. The Bahamas indicated that the question was "Not applicable".

Canada

66. The Agreement between the Government of Canada and the Government of the French Republic relating to the Exploration and Exploitation of Transboundary Hydrocarbon Fields is a framework arrangement which does not contemplate a single unified regime but instead is a means to facilitate the requirements of French and Canadian legislation to be fulfilled for any transboundary field.

67. In addition to reiterating the definitive boundary between Canada and France for all purposes, the Agreement's preamble recognizes proportionality based on respective share of reserves in a transboundary field as the basis of the Agreement and highlights the importance of good oil field practice, safety, protection of the environment and the conservation of resources in transboundary fields.

68. The following are the main features of the Agreement regarding allocation or appropriation of oil and gas, or other forms of cooperation:

(a) The Agreement envisages provision of information with a more comprehensive exchange once accumulation has been determined to be transboundary. The Agreement imposes a requirement for information exchange upon the drilling of any well within 10 nautical miles of the maritime boundary. Information exchanged cannot be further disclosed without the consent of the party that provided it;

(b) The Agreement speaks about the notice to be given to the other party, with evidence, if data shows that accumulation is (or is not) transboundary. If the other party is not convinced, that party can: (a) request a meeting of the Technical Working Group; and/or (b) send the disagreement to a single expert for determination in accordance with procedure and timelines for using the expert outlined in the Agreement;

(c) The Agreement provides for determination and redetermination of hydrocarbon reserves in a transboundary field. Indeed, the Unit Operator is to submit specific proposals on which both parties shall agree upon in a specific time frame. Should such an agreement not be reached, the disagreement is submitted to a single expert for determination, in accordance with procedure and timelines for using the expert outlined in the Agreement;

(d) Once agreement is reached or the expert determines that the accumulation is transboundary, the parties must delineate an area for the exchange of comprehensive data. If a Holder of Mineral Titles, meaning a person or firm to whom one of the parties has granted a subsisting mineral title or exclusive right to explore or exploit hydrocarbons in a particular area, is interested in production from the transboundary field, the parties will start negotiation of an Exploitation Agreement. The Exploitation Agreement is defined as any agreement entered into between Canada and the French Republic in respect of a transboundary field;

(e) The Agreement envisages a separate Exploitation Agreement for each transboundary field. It imposes a time limit for the parties to enter into Exploitation Agreement since any commercial production in a transboundary field cannot commence until an Exploitation Agreement has been concluded. If the parties are unable to conclude an Exploitation Agreement within a particular time frame, either party may refer the finalization of the Exploitation Agreement to arbitration, in accordance with the arbitration procedure outlined in the Agreement. This provides certainty as to time frames in which the Exploitation Agreement will be finalized;

(f) The Agreement requires that Mineral Title Holders conclude a Unitization Agreement that provides for: (i) combining respective rights in the transboundary field's hydrocarbon resources; (ii) sharing costs and benefits; (iii) operating the field as a single unit. The Unitization Agreement is subject to the prior written approval of both parties. This is an operator-led confidential arrangement which incorporates provisions to ensure that, in the event of a conflict between the Unitization Agreement and the Exploitation Agreement, the terms of the Exploitation Agreement shall prevail;

(g) Exploitation of any transboundary field is to be undertaken in accordance with the Exploitation Agreement and the Unitization Agreement;

(h) A Development Plan and a Benefits Plan must be agreed upon for a particular transboundary field before production can commence. A Development Plan sets out in detail the approach to the development and operation of the transboundary field while a Benefits Plan ensures that, in developing the transboundary field, and subject to all applicable domestic and international legal obligations of the parties, best efforts are made to ensure economic benefits are shared between Canada and France, taking into account the apportionment of hydrocarbon reserves as between the parties. Upon submission from the Unit Operator, parties have a specific time frame in which to approve a Development Plan and a Benefits Plan. Should the time period expire, either party can refer the matter to arbitration, in accordance with the arbitration procedure outlined in the Agreement;

(i) The parties must ensure that exploitation of transboundary field is in accordance with approved Development and Benefits Plans;

(j) The Agreement provides that all disputes are to be resolved through negotiation except for disputes which are specifically to be submitted to an expert or to arbitration.

69. The Agreement contains provisions that address environmental considerations, including transboundary environmental impact assessments. The Agreement provides for parties to conclude arrangements or agreements dealing with search and rescue, marine pollution and transboundary impact environmental assessments. For

instance, the parties are required to enter into a side arrangement on implementation of the Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland 1991, available from: http://www.unece.org/env/eia/documents/legaltexts/conventiontextenglish.pdf.

70. The parties have a duty to take all necessary measures to minimize adverse impact on the environment. The Agreement imposes a requirement for Mineral Title Holders to provide security, as determined by the party having jurisdiction over them, to meet environmental damage caused by any hydrocarbon exploration or exploitation activity.

71. On a separate note, environmental considerations are part of the approval process for oil and gas activities under Canada's domestic legislation, and this would be true in the case of transboundary fields as well.

Czech Republic

72. A specific feature of the 1960 Agreement between the Government of the Czechoslovak Republic and the Austrian Federal Government on the Exploitation of Shared Natural Gas and Oil Deposits was that the raw material was used only by one contracting party (Austria) with regard to the technically rational system of mining. The other contracting party (Czechoslovakia/Czech Republic) had at its disposal an observation well to monitor the observation of technical parameters. As the raw material comes also from the Czechoslovak/Czech territory, Czechoslovakia/the Czech Republic was entitled to certain financial compensation. The recipient of the compensation was the mining company that had the mining licence for the area, namely, the Nafta Hodonín company (now the Moravské naftové doly mining company).

73. The 1960 Agreement provides for the duty of notification in the event of any special circumstances requiring immediate measures (art. 4). The mining companies of the contracting parties cooperate in the exploitation and are expected to exchange information also on the environmental impacts of the exploitation.

Ireland

74. Ireland responded "Yes" — article 3 of the Agreement between the Government of Ireland and the Government of the United Kingdom concerning the Delimitation of Areas of the Continental Shelf between the Two Countries, as supplemented, reads as follows:

> "If any oil, gas or condensate field extends across Line A or Line B and the part of such field which is situated on one side of the line is exploitable, wholly or in part, from the other side of the line, the two Governments shall make determined efforts to reach agreement as to the exploitation of such field."

75. Ireland indicated that question 3 (a) was "Not applicable".

76. As regards, question 3 (b) an Oil Spill Contingency Plan is put in place before any drilling takes place. strategic environmental assessments also include a section on transboundary impact assessment.

Mali

77. Mali responded "No" — the Framework Agreement with Mauritania does not include any specific principles or arrangements regarding allocation or appropriation of oil and gas, nor does the Framework Agreement include any such understandings or arrangement.

Mauritius

78. Mauritius indicated that the question was "Not applicable".

Netherlands

79. In relation to question 3 (a):

(a) Articles 5 to 9 of the 1962 Supplementary Agreement to the Ems-Dollard Treaty;

(b) Articles 5 and 6 of the 1992 Markham Agreement;

(c) Paragraph (f) of the Minke Main Memorandum of Understanding.

80. As regard, question 3 (b):

(a) Article 17 of the 1992 Markham Agreement;

(b) Paragraph (d) of the Minke Main Memorandum of Understanding.

Oman

81. In relation to question 3 (a), there are arrangements to foster cooperation in the oil and gas sectors between the Sultanate and some neighbouring States. For example, there is a joint Omani-Yemeni technical committee on oil and gas. That committee has held four meetings since its creation in 1993. The most important things that were agreed on during that period are:

(a) Exchange of information and maps on common border zones in relation to oil and gas;

(b) Bilateral exchange of technical information on areas adjoining the borders and the provision of facilities to Omani and Yemeni companies wishing to invest in the oil and gas sectors; such investment must take place in accordance with the procedures followed in both countries;

(c) Training of Yemeni technicians in various areas by Petroleum Development Oman (PDO) and Occidental Petroleum Corporation in the year 2000;

(d) Exchange of visits between officials and technical personnel from both countries as well as visits to oil facilities and companies operating in the country.

82. The committee met most recently in Sana'a from 1 to 4 July 2007. Many important matters were discussed at the meeting, such as the formation of a joint working group of the Petroleum Exploration and Production Authority (PEPA) of Yemen and the Oman Oil Company (OOC) to study the possibility of investing in available areas in Yemen. Also discussed was Omani use of Yemeni expertise in the development of a centralized database, which the Ministry intends to create in the near future. A delegation from the Ministry recently visited Yemen to discuss the matter.

83. In relation to question 3 (b), in respect of environmental affairs, the Ministry of the Environment and Climate Affairs is the competent body.

E. Question 4

Please provide any further comments or information, including legislation, judicial decisions, which you consider to be relevant or useful to the Commission in the consideration of issues regarding oil and gas.

Australia

84. Australia responded "No response".

Bahamas

85. Bahamas indicated that the question was "Not applicable".

Bosnia and Herzegovina

86. Bosnia and Herzegovina cited the following:

(a) Decision of the Council of Ministers of Bosnia and Herzegovina on the quality of oil products (2002);

(b) Decree on the organization and regulation of the gas sector in the Federation of Bosnia and Herzegovina (2007); and the Gas Law relating to the Republic of Srpska (2007). Activities are ongoing on drafting of the national gas law and improving of the existing legislation on the entity level.

Canada

87. The Canadian area covered by the Agreement between the Government of Canada and the Government of the French Republic relating to the Exploration and Exploitation of Transboundary Hydrocarbon Fields is governed domestically by the Canada-Newfoundland Offshore Petroleum Board, an independent body that regulates the offshore area on behalf of Canada and the Province of Newfoundland and Labrador. The pertinent legislation is the Canada-Newfoundland Atlantic Accord Implementation Act, available at: http://laws.justice.gc.ca/en/C-7.5/index.html.

88. In addition, there is a small transboundary area that could be subject to the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, available at: http://www.cnsopb.ns.ca/generalinfo/pdf/ProvAct.pdf.

89. Both pieces of legislation provide for the management of offshore oil and gas resources on behalf of the federal and provincial governments.

Czech Republic

90. The Czech Republic has oil and natural gas deposits only in a small part of its territory, practically only in the southern and northern border areas in the east of the Czech Republic. Therefore, what is taken into consideration are the transboundary oil and natural gas deposits shared only with Austria and possibly perhaps carboniferous gas deposits shared with Poland. With regard to the really thorough

(unique in the world) geological exploration of the territory of the Czech Republic, no new oil or natural gas deposits are likely to be found and requiring a new international agreement that would regulate their shared exploitation and/or use.

Hungary

91. There are only few precedents of cross-border development of petroleum resources, therefore Hungary is not aware of relevant treaties or judicial decisions. However, the adaptation of the unitization principles elaborated by the international oil and gas industry is worth considering.

Ireland

92. Ireland indicated that the question was "Not applicable"

Mali

93. In preparation for the possible discovery of hydrocarbon reserves, the question of its transport in border areas is currently being studied. The Government is seeking to define an appropriate legal framework for this activity.

Mauritius

94. Mauritius responded "None".[8]

Netherlands

95. The 1962 Supplementary Agreement to the 1960 Ems-Dollard Treaty on the allocation of oil and gas is an exceptional agreement in that it provides for the division of oil and gas reserves in an area where no inter-state boundary exists. In the 1960 Ems-Dollard Treaty, the Netherlands and Germany "agreed to disagree" with regard to a boundary in the Ems-Dollard area, which had been under dispute for several hundred years. Taking into account this exceptional situation, it was agreed in 1962 to equally divide the oil and gas reserves between the two countries in an area defined as the "border area". The agreements that have been concluded with respect to the Ems-Dollard estuary are regarded by many as exemplary of how to deal with a situation where no agreement concerning a boundary can be reached between two countries.

96. The 1992 Markham Agreement was a specific agreement for a specific situation, which resulted in an elaborate and detailed agreement.

Oman

97. Oman responded that no information relevant to question 4 was currently available

Turkey

98. According to international law, the delineation of the continental shelf, as well as the exclusive economic zone in semi-enclosed seas such as the Eastern

[8] However, the Government of Mauritius annexed to its response the Petroleum Act, Act No. 6 of 16 April 1970, the text of which, in English, is available for consultation at the Codification Division of the Office of Legal Affairs.

Mediterranean could only be possible through arrangements to be made among all the countries concerned and by observing the rights and interests of all the parties.

99. In this respect, Turkey's views regarding the Greek Cypriot attempts that are contrary to international law and legitimacy, to delimit maritime jurisdiction areas and to issue licenses for exploring oil and gas in the Eastern Mediterranean Sea have been duly conveyed to the United Nations and other relevant international organizations, as well as to the international community, on every occasion.

100. In this context, following the signing of a delimitation agreement between Egypt and the Greek Cypriot side on 17 February 2003, it has been registered with the letter of the Permanent Mission of Turkey dated 2 March 2004, which was also circulated as a United Nations document (published in the *Law of the Sea Bulletin*, No. 54), that the attempts of the Greek Cypriot side to delimit maritime jurisdiction areas are unacceptable, and that Turkey also has legitimate rights and jurisdiction in areas to the west of the Island of Cyprus beyond the longitude 32° 16' 18" East. In this vein, it has been stated that the Greek Cypriot endeavours to create de facto situations through unilateral acts in the Eastern Mediterranean would not be accepted.

F. Question 5

Are there any aspects in this area that may benefit from further elaboration in the context of the Commission's work? Please indicate those aspects.

Australia

101. Australia feels that the Commission should approach with caution any examination of areas of international law that directly engage matters that are essentially bilateral in nature. Australia acknowledges the valuable work undertaken by the Commission and especially the Special Rapporteur, Mr. Chusei Yamada, on the general topic of shared natural resources and, in particular, shared underground aquifers.

102. With respect to the Commission's proposed consideration of shared oil and gas, this is one of essential bilateral interest — that is, one to be resolved by negotiation between the particular States involved. The topic is already adequately covered by international law principles and dealt with by States on a bilateral basis.

103. If the Commission proceeds with its consideration of shared oil and gas resources, Australia considers that it should not examine matters relating to offshore boundary delimitation. Whether such resources are in fact physically shared is first and foremost a question of delimitation of territory or maritime jurisdictions. Individual circumstances will impact on each situation and States will want to resolve any differences on a case-by-case approach. These differing circumstances will throw up a degree of complexity that would be difficult to succinctly distil. Maritime delimitation, and assessment of offshore resources, are matters for the States concerned and this is made clear by the 1982 United Nations Convention on the Law of the Sea. In addition, in Australia's experience delimitation agreements generally contain unitization clauses that deal with petroleum resources that straddle the agreed boundary.

Bahamas

104. There is the issue of horizontal drilling regarding transboundary oil and gas resources that requires further dilation.

Bosnia and Herzegovina

105. Bosnia and Herzegovina responded "Not defined".

Canada

106. While there is a growing demand for rules governing the use of shared or transboundary natural resources, Canada believes that the oil and gas issue is essentially bilateral in nature, highly technical and politically sensitive and encompasses diverse regional situations. As such, it should be left for resolution by negotiation between States involved. As a result, Canada is not persuaded by the need for the Commission to develop any framework or model agreement(s) or arrangement(s) or draft articles on oil and gas.

107. However, Canada does see the benefit of the Commission outlining elements that could guide States when negotiating agreements on partition of oil and gas. A "template of elements" on the practice applicable, including a review of the existing agreements and State practice, along with an identification of common principles and features, best practices and lessons learned, would be very useful, not only to Canada, but also internationally. Such a template could separate (a) circumstances where there is no delimitation agreement in place; and (b) circumstances where a delimitation agreement is already in place.

108. Should the Commission proceed with the consideration of the topic of shared oil and gas resources, Canada would not endorse the Commission examining matters relating to offshore boundary delimitation.

Ireland

109. Ireland responded "No", and in relation to indicating those aspects, Ireland responded, "Not applicable".

Mali

110. Certain aspects of the transport of Malian oil and gas to terminals in neighbouring countries need more detailed study, namely: integration and harmonization of the regulations of the different countries; and understandings and/or arrangements with neighbouring countries with which Mali shares sedimentary basins.

Mauritius

111. Mauritius responded "No".

Oman

112. Oman responded that no information relevant to question 5 was currently available.

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Sixty-first session
Geneva, 4 May-5 June and 6 July-7 August 2009

Shared natural resources

Comments and observations received from Governments

Corrigendum

Paragraph 2

Paragraph 2 *should read*

As at 31 January 2009, responses to the questionnaire had been received from the following 18 States: Algeria, Argentina, Australia, Austria, Bahamas, Bosnia and Herzegovina, Canada, Chile, the Czech Republic, Hungary, Ireland, Mali, Mauritius, the Netherlands, Oman, the Republic of Korea, Tunisia and Turkey. The responses are contained in the present report and are organized, to the extent possible, on the basis of the questions contained in the questionnaire.

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Shared natural resources

Paper on oil and gas prepared by Mr. Chusei Yamada, Special Rapporteur on shared natural resources

1. The present informal paper has been prepared for the members of the Working Group on Shared Natural Resources, which might be established at the sixty-first session of the Commission to consider the question of oil and natural gas within the wider topic of shared natural resources.

2. The Commission began its work on shared natural resources in 2002. It was generally understood that the topic covered three kinds of natural resources: groundwaters, oil and natural gas, as indicated in the syllabus prepared by Robert Rosenstock.[1] The Commission adopted a step-by-step approach, beginning with groundwaters. It completed the second reading of the draft articles on the law of transboundary aquifers in 2008 and transmitted them to the General Assembly with the recommendation that the Assembly (a) take note of the draft articles in a resolution and annex them to the resolution, (b) recommend to States to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in the articles and (c) consider at a later stage the elaboration of a convention on the basis of the articles.[2] By adopting its resolution 63/124, the General Assembly acted along the lines of the Commission's recommendation.[3]

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[1] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), annex.

[2] Ibid., *Sixty-third Session, Supplement No. 10* (A/63/10), para. 49.

[3] In resolution 63/124 the General Assembly:

> 4. *Takes note* of the draft articles on the law of transboundary aquifers, presented by the Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action;
>
> 5. *Encourages* the States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, taking into account the provisions of these draft articles;

09-24192 (E) 110309

3. During the Commission's work on transboundary aquifers, questions on the possible work on oil and natural gas and its relevance to the work on groundwater were often raised not only in the Commission but also in the Sixth (Legal) Committee of the General Assembly. In 2007, while the Commission was awaiting comments and observations from States on its first-reading draft articles on the law of transboundary aquifers, which had been adopted in 2006, it received the fourth report of the Special Rapporteur (A/CN.4/580). The report covered the questions of oil and natural gas, including a preliminary study of oil and natural gas resources, their similarities and dissimilarities with groundwaters, management practice and environmental implications. Following the plenary debate, the Working Group on Shared Natural Resources, chaired by Enrique Candioti, was established to consider various issues raised in the report.

4. On the basis of considerations by the Working Group,[4] the Commission decided to proceed to the second reading of the law on transboundary aquifers independently of any possible work on oil and natural gas, it being understood that the latter two resources would be considered together, and also to circulate a questionnaire on oil and natural gas to States. Such a questionnaire would, inter alia, seek to determine whether there were any agreements, arrangements or practice regarding the exploration and exploitation of transboundary oil and natural gas resources or for any other cooperation for such resources, including maritime boundary delimitation agreements, as well as unitization and joint development agreements or other arrangements.

5. Pursuant to the decision of the Commission, the secretariat of the Commission circulated the following questionnaire, to which 18 States have so far responded:[5]

> 1. Do you have any agreement(s), arrangement(s) or practice with your neighbouring State(s) regarding the exploration and exploitation of transboundary oil and gas resources or for any other cooperation for such oil and gas?
>
> 2. Are there any joint bodies, mechanisms or partnerships (public or private) involving exploration, exploitation or management of transboundary oil or gas?
>
> 3. If the answer to question 1 is yes, please answer the following questions on the content of agreements or arrangements and regarding the practice:
>
> (a) Are there any specific principles, arrangements or understandings regarding allocation or appropriation of oil and gas, or other forms of cooperation? Please provide a description of the principles, provisions, arrangements or understandings.
>
> (b) Are there any arrangements or understandings or is there any practice regarding prevention and control of pollution or regarding other

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6. *Decides* to include in the provisional agenda of its sixty-sixth session an item entitled "The law of transboundary aquifers" with a view to examining, inter alia, the question of the form that might be given to the draft articles.

[4] See A/CN.4/L.717. See also *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), paras. 178-183.

[5] Algeria, Argentina, Australia, Austria, Bahamas, Bosnia and Herzegovina, Canada, Chile, Czech Republic, Hungary, Ireland, Republic of Korea, Mali, Mauritius, Oman, Netherlands, Tunisia and Turkey (see A/CN.4/607).

environmental concerns, including mitigation of accidents? Please provide further description.

4. Please provide any further comments or information, including legislation, judicial decisions, which you consider to be relevant or useful to the Commission in the consideration of issues regarding oil and gas.

5. Are there any aspects in this area that may benefit from further elaboration in the context of the Commission's work? Please indicate those aspects.

6. Although it will be necessary to encourage the further submission of responses to the questionnaire from the States concerned, the replies so far received are useful in identifying the problems of oil and natural gas. There exist many bilateral agreements and arrangements between the States concerned and between their national oil and gas companies. The texts of these agreements should be carefully analysed. They generally provide for cooperation, exchange of information, effective exploitation, equitable sharing, protection of environment, etc. There also exist joint mechanisms but they are as yet rather informal and embryonic. Unlike the case of transboundary aquifers, oil and natural gas reserves are often located on the continental shelf. In such situations, the maritime boundary delimitation is the prerequisite for determining the existence of transboundary resources. However, most of the coastal States have the firm position that that is a matter to be decided solely by those States concerned. Some States also hold that the question of oil and natural gas is bilateral, highly technical and politically sensitive and that it must be dealt with case by case. Accordingly they urge the Commission to take a cautious approach.

7. States made oral comments on the possible work by the Commission on oil and natural gas during the debate in the Sixth Committee in 2007 and 2008. One State consistently held that the work on groundwater and oil and natural gas must be conducted together.[6] Some other States supported the Commission's approach of treating groundwater independently of oil and natural gas, but their positions on the possible work on oil and natural gas were diverse. Some States doubted the need for any universal rules on oil and natural gas and advised the Commission not to proceed with the codification work,[7] pointing out mainly that the question of oil and natural gas is bilateral, highly technical and politically sensitive and that it must be dealt with on a case-by-case basis, while also stressing the need to avoid any encroachment into questions of maritime delimitation. Some other States favoured the Commission proceeding with the work.[8] Yet others were not decided but favoured either further study or a cautious approach.[9] Some States also stressed the importance of the concept of unitization, which implies the consideration of the

[6] The Netherlands; see A/C.6/62/SR.24 and A/C.6/63/SR.19.

[7] The Nordic countries (A/C.6/62/SR.22 and A/C.6/63/SR.16), United Kingdom of Great Britain and Northern Ireland (A/C.6/63/SR.16), Australia (A/C.6/63/SR.17), Canada (A/C.6/63/SR.17), Greece (A/C.6/63/SR.17), United States of America (A/C.6/62/SR.22 and A/C.6/63/SR.18), Islamic Republic of Iran (A/C.6/62/SR.25).

[8] Poland (A/C.6/63/SR.17), Uruguay (A/C.6/63/SR.18), Democratic Republic of the Congo (A/C.6/62/SR.24).

[9] China (A/C.6/62/SR.22), Republic of Korea (A/C.6/63/SR.16), Germany (A/C.6/63/SR.16) Mexico (A/C.6/63/SR 17), Russian Federation (A/C.6/63/SR.18), Lebanon (A/C.6/63/SR.18), Italy (A/C.6/62/SR.22), Romania (A/C.6/62/SR.24), Venezuela (A/C.6/62/SR.25), New Zealand (A/C.6/62/SR.25).

transboundary oil and natural gas field as one unit with a single operator but where earnings and costs are shared.[10]

8. In the absence of consensus among States on the question of possible work on oil and natural gas, it is the view of the Special Rapporteur that the Commission must make further studies before making any definitive decision whether to proceed with the codification process of oil and natural gas. It is advisable that the Commission establish a programme of work for the studies for the next several years. The Commission would need further inputs from States. The Commission must also consider ways and means to seek assistance from the relevant international organizations, such as the Economic Commission for Europe, and from scientific, technical, administrative, commercial and legal experts.

[10] The Nordic countries (A/C.6/63/SR.16), Mexico (A/C.6/63/SR.17), Indonesia (A/C.6/62/SR.25).